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LOUISIANA  
ANNUAL REPORTS.



88

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF  
LOUISIANA.

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*VOLUME XXX.*  
FOR THE YEAR  
1878.

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PART II.

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PERCY ROBERTS,  
REPORTER.

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NEW ORLEANS:  
F. F. HANSELL, PUBLISHER; JAMES A. GRESHAM, MANAGER,  
30 AND 36 CAMP STREET.  
1879.

rec. Mar. 17, 1879

JUSTICES  
AND  
OFFICERS OF THE COURT

DURING THE TIME OF THESE REPORTS.

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CHIEF JUSTICE,  
THOMAS COURTLAND MANNING, LL.D.

---

ASSOCIATES,  
ROBERT HARDIN MARR,  
ALCIBIADE DeBLANC,  
WILLIAM B. GILES EGAN,  
WILLIAM BRAINERD SPENCER.

---

ATTORNEY GENERAL,  
HORATIO NASH OGDEN, Esq.

ASSISTANT,  
JAMES CONSTANTINE EGAN, Esq.

---

REPORTER,  
PERCY ROBERTS, Esq.

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CLERKS,  
ALFRED ROMAN . . . . . NEW ORLEANS.  
BENJ. R. ROGERS . . . . . OPELOUSAS.  
TALBOT STILLMAN . . . . MONROE.



## **In Memoriam.**

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MONDAY, December 2, 1878.

The Court was duly opened, pursuant to adjournment, present their HONORS THOMAS C. MANNING, Chief-Justice, and ROBERT H. MARR, ALCI-BIADE DEBLANC, WILLIAM B. SPENCER, Associate Justices.

H. N. Ogden, Attorney General, arose and said :

If it please the court, on Saturday last, at a meeting of the bar of this city, which was called for the purpose of giving expression to the feelings with which the members of the profession had received the news of the death of Judge EGAN, a series of resolutions was adopted, with the request that I should discharge the mournful task of presenting them to the court.

Those resolutions are as follows :

Whereas, the Bar of New Orleans and the State of Louisiana recognize a great loss in the death of the HON. WILLIAM B. EGAN, Associate Justice of the Supreme Court, his great ability as a judge, his purity of character as a man, and the great zeal displayed by him in the discharge of the duties of his office ; therefore, be it

Resolved, That, as a tribute of respect to the memory of the deceased, the Attorney General of the State be requested in behalf of the members of the Bar to present this preamble and these resolutions to the Honorable the Supreme Court, to be spread upon the minutes, and that the court be asked to adjourn.

And be it further resolved, That the secretary of this meeting be directed to send a copy of these resolutions to the family of the deceased.

(Signed)

A. GOLDTHWAITE, Secretary.

If the court please, in presenting these resolutions, I desire to say a few words in regard to their subject. I am aware that in this presence it is a work of supererogation to speak in praise of Judge EGAN. This court, during his occupancy of that chair, and the members of the bar, during the long course of his professional practice, have had ample opportunity to study and admire his characteristic traits, and that vacant chair appeals more eloquently than I possibly could to the feelings which animate us all. Not a single lawyer is there here who can not by his memory fill that chair ; not one who can not recall the emaciated form sitting there, all kindness, all attention to the speaker before him ; and the members of this court, in the habit of daily meeting him in consultation, want no eulogium of him at my hands.

In whatever light we look upon Judge EGAN, we find ample cause for admiration and respect.

It was my privilege to know him well in private as in public life, and in all the relations in which I met him his demeanor was ever that of what is termed a gentleman of the old school, showing the same refinement, the same politeness, the same courtesy to all under all occasions. And, though it may be invading the sanctity of home, I can not forbear to allude to the deep impression made upon me by his conduct toward his venerable father, never failing in the smallest duty, in the least respect for him, and ever striving by all the means in his power to render the father's life happy. Never, in all my experience, have I known a man so careful to have his conduct conform in all things to the maxim, "Do unto others as you would have them do unto you."

As a citizen, Judge EGAN was by understanding and education, not by impulse alone, a patriot. Knowing fully all the obligations of a citizen, he performed them thoroughly, and on every occasion of danger was prominently to the front. His constitution unfitted him for political life, yet he never failed to give his time, his attention, and his talent to the public business. Carefully trained by his father, the venerable Dr. Bartholomew Egan, whose life binds together two distant periods in the history of this country, and whose mind was formed in that ancient school of statesmen who struggled and fought for principles because they were principles, Judge EGAN was fully imbued with and conformed himself to those ideas and views.

As a lawyer, he was devoted to his profession and the interests of his clients, showing there the same earnestness that he exhibited in the other walks of life.

As a judge, he was careful, conscientious, upright, and diligent.

In any and every aspect of this excellent man's character we find nothing but what entitles him to esteem and regard. As a Christian, he was a faithful and devoted member of the Episcopal Church, and his life a daily refutation of the old maxim, *Bonus jurista, malus Christa*.

In fine, I know of no man the memory of whose character should be more carefully preserved; of no man whose record is of more value to his profession and to the community in which he lived.

The keystone to the arch of this admirable character, that which gave it consistency and power, was evidently his profound love of duty. His moral nature moved always in this orbit and in obedience to that great law which, corresponding to the law of gravitation in the physical world, holds society with all its varied interests together.

It is proper, therefore, that the bar should have taken the action which it took, and eminently proper that this court should signify its appreciation of the deceased in the manner suggested by the resolutions.



On behalf of the Court His Honor the Chief Justice said :

*Mr. Attorney General and Gentlemen of the Bar.*—We received the tidings of our associate's death with great sorrow. This sorrow was none the less because the event was in some sort anticipated. His feeble health during our last term, and its continuance through the summer and autumn gave to us, who were cognizant of his increasing ailments, warning of a probable fatal termination. We respond to the sentiments which have been so felicitously expressed by the Attorney General in presenting the resolutions of the bar touching the loss which the profession, in common with this court, has sustained.

Mr. Justice EGAN was trained for the bar in Virginia, whence he came in early manhood to this State, and immediately entered upon active professional life. Twice called to the district bench, he discharged the duties of that position in such manner as to single him out for further preferment, so that when elevated to the place he occupied beside us, he brought with him the approbation of those who knew his eminent fitness.

There is great expressiveness in the phrase "a conscientious and upright judge," and our deceased brother was well entitled to have it applied to him. He was a pattern of uprightness and purity, careful in investigation, weighing well all that had been said by counsel, whether in oral or printed argument, on the one side or on the other ; but always looking straight forward to find out where the right lay, and steadily following that right when his mind was satisfied. He was a man of extraordinary firmness, and when his own convictions were fixed and had been fixed by patient hearing and deliberate thought, he could brave without quailing any obloquy in maintaining them. When he had convinced his judgment on the law of any case his independence and courage assumed the dignity of moral heroism, and from that moment he confronted consequences unflinchingly and with a sort of proud defiance that exulted in the consciousness of his own rectitude. He was, indeed, brave as a lion, and in all respects above reproach.

One of the conspicuous qualities of his mind was caution, as courtesy was a marked characteristic of his manner. He had that suave and gentle politeness which was formal without degenerating into formalism, and which we are accustomed to hear called the manner of the old school, and which, certainly, in some respects deserves imitation. His personal carriage was dignified and graceful, and his public utterances were always in good taste and of good quality.

We unite with our brethren of the bar in tendering to the family of the deceased our sincere condolence, and as a testimonial of respect to his memory, the resolutions and other proceedings of the bar shall be spread upon our minutes, and we shall adjourn without transacting any business.



# RULES

## OF THE

# SUPREME COURT.

REVISED AND ADOPTED MAY 30, 1878.

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### RULE I.

1. In preparing transcripts of records, in causes appealed to this Court, clerks of lower courts must observe the following requirements:

*First*—Such transcripts should be written in a fair, legible hand, on good, strong paper (the latter having a double margin on each page thereof), and the various parts should be securely fastened together.

*Second*—The different portions of a record should be made to appear in the order of their respective filing.

*Third*—Provided, however, that when the records of one or more other suits are introduced as evidence in a cause, such records should appear in the transcript distinct from, and subsequent in order to, the rest of the record of the principal suit.

*Fourth*—The transcript should show for which party to the suit each witness is sworn, and by which party each document or record is offered in evidence.

*Fifth*—No one document should be copied twice in the transcript.

*Sixth*—An accurate alphabetical index should be attached to and form part of each transcript, affording reference to particular pages of the same (and with proper designations or words of description) for the several pleadings, processes, and orders in the suit; for the depositions and testimony of each witness by name (and not by general reference to testimony); for the note of evidence; and for each document, giving the latter its correct title, or some sufficient designation showing its nature and character, (and not merely by the letters, marks, or figures indorsed thereon).

*Seventh*—Provided, that when records of other suits are included in the transcripts, as indicated above in the third requirement, a like index to each of such records should follow the general index.

2. Any neglect or omission to observe this rule strictly, will subject clerks, as aforesaid, to the cost of repairing such neglect or omission.

## RULE II.

The party applying for the filing of a transcript of the record in a cause in this Court, must first tender to the clerk his bond, with satisfactory security, in the sum of fifty dollars, for the payment of such fees as may accrue to the clerk, or deposit with the latter, in place of such bond, the sum of twenty dollars.

## RULE III.

1. Cases will be docketed in the order of their filing.
2. Pursuant to Acts No. 17, of the laws of 1876, and No. 22, of 1878, the clerk will keep a *Summary Docket*, but will enter causes therein only on the formal application of counsel in writing, stating the facts entitling such causes to a summary trial, and he will so enter them in the order of such application.
3. Whenever it shall be made to appear to the Court that a case has been improperly caused by counsel to be placed upon the *Summary Docket*, the same shall thereupon be transferred to the *Ordinary Docket*, and entered at the foot thereof.

## RULE IV.

1. Only counsel engaged in a cause will be allowed to withdraw the record of the same from the clerk's office, and then not until the expiration of the three days allowed by law within which motions to dismiss may be filed.
2. Records shall, in all cases, be receipted for on withdrawal. They should be returned to the office within a reasonable time, and must be so returned on the requisition of the clerk.
3. No record shall be withdrawn from the clerk's office after final decree therein made has become executory, except upon written application to the Court therefor, and the order of the Court made thereon.
4. Whenever the transcript of appeal, which has been filed in the clerk's office of this Court, is lost, mislaid, or has been removed from that office, either party to said appeal may supply its place by another transcript, which shall be considered as filed of the same date as the filing of the lost, mislaid, or removed transcript: and any cause in which such substituted transcript shall be filed, will be heard in its regular place on the calendar, notwithstanding the absence of the transcript first filed in this Court.

## RULE V.

Court will be held every day of each alternate week of the session.

## RULE VI.

1. On Monday of each court week cases will be called and fixed for the next court week:—three for Monday, and eight for every other day; provided however, if there be causes entitled to a place on the

*Summary Docket*, fifteen of them shall be called and fixed for Tuesday, and the same number (if there be so many) shall be fixed for each succeeding day, until the Summary causes are exhausted. These cases shall be properly posted by the clerk, by eleven o'clock of the next day, which shall be notice to all parties. (This portion of the rule will not apply in country terms, during the pendency of which cases will be called and tried continuously, in the order in which they are filed).

2. Before the calling of cases, opportunity will be given counsel to have any cause entitled to preference, but not to entry in the Summary Docket, made subject, on motion, to be called and fixed for trial.

3. All cases which have not been submitted to the Court, after having been twice duly called for trial, shall be removed from the docket and placed upon a docket to be called the *Delay Docket*, and shall not be again put upon the Trial Docket, except on motion and leave granted thereon.

#### RULE VII.

1. Within six days after any cause shall be fixed for trial, the appellant shall file with the clerk a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents (referring particularly to the pages of the record where they may be found), and an accurate reference to the points of law and authorities upon which he relies. Ten copies thereof to be furnished and filed with the clerk; one for the opposite counsel, and the remainder for the use of the Court.

2. Within twelve days after the fixing of a cause, the appellee shall also file ten copies of a similar brief, embodying the requirements set forth in regard to the appellant.

3. No cause shall be heard unless one at least of the parties has complied with the foregoing sections of this rule, and if neither party has so complied, the case shall be continued and go to the foot of the docket. If only one party has complied, he may argue or submit the cause, or may decline to do either, in which last event the case shall be continued and go to the foot of the docket, and it is made the duty of the clerk to inform the Court on this point when a case is called for trial.

4. If appellant has filed a brief *before* the day fixed for hearing the cause, but not within six days after it was fixed for hearing, and the appellee has not filed a brief at the time the cause is called for trial, then the appellant may submit the case, and the appellee may be allowed five days to file his brief, but the case shall not be orally argued. If the appellant shall not have filed any brief before the day fixed for the hearing of the cause, and the appellee has filed his brief before the opening of the Court on that day, the latter may argue or submit the cause, or not as he shall prefer, and appellant shall not in that case be

permitted to argue orally the cause, if the appellee does not, nor shall he have time to file a brief.

5. The clerk shall receive no brief in a cause, after it is submitted, unless accompanied by a certificate in writing from counsel that he has delivered a copy to the opposite counsel, with the date of such delivery, or by a written acknowledgment or waiver of such delivery signed by opposite counsel, who shall have, upon application to the Court, a reasonable time from the date of such delivery or waiver in which to reply; and in such cases ten copies must be filed by each party as prescribed in the first section of the rule.

6. All briefs in a cause must be filed in the clerk's office, and before the opening of Court on the day upon which the cause is fixed for trial.

#### RULE VIII.

1. The original plaintiff in the lower court shall have the right of opening and closing the argument of the cause in this Court.

2. Not more than one hour will be allowed to the counsel for each side, except where in special cases the Court, on application made before the opening argument is begun, may otherwise order. The time not consumed by one counsel will be allowed to another on the same side.

#### RULE IX.

1. Applications for rehearing must be by petition filed within the legal delay, and must be accompanied by a printed statement of all the points and authorities on which the party founds his application. Additional time for elaborating the argument on such points and authorities may be granted upon a proper showing, if made before the delay expires.

2. When a petition for rehearing in any cause is filed, the clerk will immediately enter it, with its date, in the docket kept for the purpose, and place the record with the decision and five copies of the petition in the consultation room.

3. When a rehearing is granted the cause will be immediately called and fixed with preference, and briefs will be required, as in the first and second sections of Rule VII.

Oral argument may be granted, in the discretion of the Court, if applied for on motion, and four days notice thereof be given to the opposite counsel.

The clerk will properly designate the cause on the Judges' docket as being upon rehearing, and also the fact when oral argument is to be heard.

4. Only one rehearing in any cause will be granted.

#### RULE X.

1. Motions for dismissal of appeals shall be filed and fixed for trial by the clerk in his office. They shall be so fixed for Monday of each

court week, at least one week's previous notice being given by posting, as prescribed in the first section of Rule VI.; but if not tried on the day for which they are thus fixed, they shall be continued to Monday of the next court week.

2. Such motions shall set forth distinctly all the grounds relied on, and on their trial shall be argued only in printed briefs, which must conform in character and number to the requirements stated in sections first and second of Rule VII.

#### RULE XI.

1. All motions made in open Court must be offered before the regular business of the Court is begun or after it is closed.

2. No motion will be entertained unless it is in writing, upon not less than a half-sheet of paper, and with a proper title indorsed upon it.

3. All instructions to the clerk and agreements of counsel, on which the Court is to act, must be in writing and duly filed.

#### RULE XII.

1. The Court will entertain no application for a writ of prohibition, unless previous notice of intention to make such application shall have been given to the opposite party.

2. Hereafter all writs of *mandamus* and prohibition, and rules to show cause, shall be fixed and submitted on printed briefs, and without oral argument.

#### RULE XIII.

Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases. When the appellant dies, pending the appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order, that unless they appear and become parties within three months from publication, the appeal will be dismissed. The appellee must cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication and in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined, as in other cases.

If the appellee dies pending the appeal, and his proper representatives be known and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days, and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined, as in other cases.

If the appellee's proper representatives be not known, or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the Court sits, and upon proof of such publication, and in default of appearance, the appellant may proceed to have the cause heard and determined, as in other cases.

In country cases the time of personal summonses may be reduced, on special application, according to circumstances.

#### RULE XIV.

No person applying for admission as an attorney and counselor-at-law shall be examined as such, until his name as a candidate for admission shall have been, by the clerk, published during three judicial days, at the foot of the trial list, posted at the court-room door. Application to be made through the clerk.

The Court will hereafter require of candidates for admission to the bar :

*First*—Evidence of citizenship of the State of Louisiana.

*Second*—Evidence of good moral character, by certificates, in conformity to the statutes of March 29, 1823, and March 20, 1842, and of two years study according to act of May 7, 1877.

The Court will not be satisfied with the qualification of a candidate in point of legal learning, unless it shall appear by examination that he is well read in the following course of studies at least : Story on the Constitution ; Vattel's Law of Nations, or Wheaton's Elements of International Law ; the Louisiana Civil Code ; the Code of Practice ; the Statutes of the State of a General Nature ; the Institutes of Justinian ; Domat's Civil Law ; Pothier's Treatise on Obligations ; Blackstone's Commentaries, Fourth Book ; Kent's Commentaries ; Smith on Mercantile Law ; Story or Parsons on Notes ; Chitty or Bayley on Bills ; Greenleaf, Starkie, or Phillips on Evidence ; Russell on Crimes ; and the Jurisprudence of Louisiana, as settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner : At the beginning of the session in New Orleans, the Court will appoint from



among the members of the bar, a committee of *seven*, who are earnestly requested to lend their aid to the Court. Upon the candidate producing a certificate from the committee that he has been examined by them upon the above works, and that he is, in their opinion, qualified for admission to the bar, the Court will admit him to a public examination, and if, after such public examination, they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counselor-at-law, and not otherwise.

The committee will meet twice in each month, during the sessions of the Supreme Court, to wit: on the Friday preceding each court week.

The Court will examine on Tuesday of each court week.

Each candidate to be examined separately before the committee and the Court.

The foregoing rules will be relaxed in the country districts when necessary for the proper dispatch of business, or when their rigid enforcement, in the short time the Court sits in those districts would work injury, or a protracted delay.



## TABLE OF CASES REPORTED.

PAGE.	PAGE.
Agelasto vs. Mills.....	1345
Allen vs. Merchants' Mutual Insurance Company.....	1386
Allison, Cooke, vs.....	963
Allison & Co. and Sheriff, Jurey & Gillis vs.....	1234
Amacker, George vs.....	390
Amédée, Herrmann & Vignes vs	393
Anderson vs. Arnette et al....	72
Anderson, State vs.....	557
Anselm, Succession of.....	1145
Arnette et al., Anderson vs....	72
Arthur & Co., Avendano vs....	316
Attorney General, Lannes et al. State ex rel. vs.....	954
Aurich vs. Wolf & Levi.....	375
Austin vs. Citizens' Bank and Sheriff.....	689
Avendano vs. Arthur & Co....	316
Baker, State vs.....	1134
Baird, Nalle vs.....	1148
Banker vs. Harrington & Co. 136	
Bankston, Sharkey, Tutor, vs. 891	
Barfield et al., Harrington vs. 1297	
Barkdull vs. Herwig and Smith 618	
Barrow, State ex rel. Rills vs.. 657	
Barrow vs. Lapene.....	310
Barth vs. Kasa.....	940
Bartley vs. City of New Orleans 264	
Bass vs. Messick, Sheriff, et al. 373	
Bauer vs. Lochte & Cordes and Sheriff.....	685
Bauman, Succession of.....	1138
Bayly, Succession of.....	75
Bayly & Pond vs. Stacey & Poland.....	1210
Beatty <i>alias</i> Brown et al., State vs.....	1266
Beauregard vs. Leveau.....	302
Becker, State vs.....	682
Beonel, Succession of Bailly vs. 1032	
Beelman and Beelman, Laurent vs.....	363
Benedict vs. Florat, Tutor, et al. 1337	
Benton vs. Mahan et al.....	1401
Bérard vs. Boagni.....	1125
Bessou, Brown vs.....	734
Bevens vs. Weill et al.....	185
Bienvenu vs. Parker.....	160
Bienvenu et al., Morris vs....	878
Billgery, Ducoing vs.....	250
Billgery vs. Ferguson.....	84
Bishop & Co. et al., Dodd, Brown & Co. vs.....	1178
Blake et al. vs. Minors Kearney and Lake.....	388
Blanton vs. Ludeling et al....	1232
Blasini et al. vs. Succession of Blasini.....	1388
Bloom & Co. vs. Kern et al....	1263
Blouin et al. vs. Liquidators of Hart & Hébert.....	714
Boagni, Bérard vs.....	1125
Board of Assessors, State ex rel. N. O. City R. R. Co. vs..	261
Board of Health et al., Clark vs.....	1351
Board of Liquidators, State ex rel. Board of Supervisors vs.	816
Board of Liquidation, Louisiana National Bank vs....	1356
Board of Liquidation, Lord Cecil et al. vs.....	34
Board of Liquidators, Hamlin et al. vs.....	443
Board of Liquidation, Lesassier & Binder vs.....	611
Board of Liquidation, Forstall & Sons vs.....	1151
Board of School Directors vs. Delahoussaye, Sr.....	1097
Bollinger, Succession of.....	193
Bondurant, Watson vs.....	1
Bonner, Garrett, Executor, vs. 1305	
Bougère, Succession of.....	422
Boult vs. Sarpy et al.....	494
Bouny et al., Brown vs.....	174
Boutté et al. vs. Executors of Boutté et al.....	177
Boutté, Succession of.....	128
Bowman vs. Kaufman, Sheriff. 1021	
Bowman, Parish of Plaquemines vs.....	1403
Bradford vs. Lafargue.....	432
Bradley et al., State vs.....	326
Breaux, Fenner & Hall vs. Francke.....	336
Briant vs. Hébert et al.....	1127
Brice vs. Watkins et al.....	21
Brinker, Johns vs.....	241
Briscoe, State vs.....	433
Broadway Savings Bank of St. Louis vs. Vorster et al.....	587

	PAGE.		PAGE.
Brooks, State vs .....	335	City of New Orleans, State ex	
Broussard vs. Leo Ditch and		rel. Houston vs. ....	82
Sheriff .....	1109	City of New Orleans vs. David-	
Brown, Administ'r vs. Brown.	966	son et al. ....	541
Brown vs. Bessou .....	734	City of New Orleans vs. David-	
Brown vs. Bouny et al. ....	174	son and Hill et al. ....	554
Brown and Husband vs. Brown	506	City of New Orleans, New-Or-	
Brown, State ex rel. Strauss vs.	78	leans Canal and Banking	
Brown et al., Ventress, Execu-		Company vs. ....	1371
trix, vs. ....	1012	City of New Orleans vs. Mer-	
Brugier and Sheriff, Burton and		chants' and Traders' Insu-	
Wife vs. ....	478	rance Company .....	876
Buckley vs. Seymour .....	1341	City of New Orleans vs. Four-	
Buckner et al., Klein vs. ....	680	chy. ....	910
Burbank vs. Harris .....	487	City of New Orleans, Jefferson	
Burns, State vs. ....	679	and Lake Pontchartrain Rail-	
Bussey & Co. vs. Nelson .....	25	way Company vs. ....	970
Butler, Succession of. ....	887	Clark, Summers & Brannins vs.	436
Burton, Ledoux vs. ....	576	Clark vs. Board of Health et	
Burton and Wife vs. Brugier		al. ....	1351
and Sheriff .....	478	Clark, Succession of. ....	801
Caillier, Adminis'trix, Maraist,		Claverie vs. Gerodias and Hus-	
Fournet & Co. vs. ....	1087	band. ....	291
Caillouet, Sevin & Gourdain vs.	528	Clifton, State vs. ....	951
Calhoun vs. Mechanics' and		Clinton and Port Hudson R. R.	
Traders' Bank. ....	772	Company vs. Tax Collector.	626
Carlin, Querin, Administratrix,		Cobb vs. Richardson, Sheriff, et	
vs. ....	1131	al. ....	1228
Carroll & Co. vs. Hamilton et		Cochran vs. Ocean Dry-Dock	
al. ....	520	Company. ....	1365
Catherwood & Co. vs. Shepard	677	Cole, LaChambre & Co. vs. ....	961
Cavanac, Administrator, Mc-		Collens, State ex rel., Jumel vs.	861
Caffrey, Administrator, vs. ....	882	Collier White Lead Company,	
Cavanac, State ex rel. Lacaze		Ranlett vs. ....	56
et al. vs. ....	237	Collins, Sheriff, et al., Snider et	
Cawthorn et al. vs. Cawthorn.	1181	al. vs. ....	1236
Chaffraix & Agar vs. Lafitte &		Collins, Saloy vs. ....	63
Co. ....	631	Comeau and Wife, Thibodeaux	
Chaffe & Bro. vs. Morgan .....	1307	vs. ....	1119
Chargois, State ex rel. Coce vs.	1102	Compton vs. Sanford. ....	838
Chatenond and Husband vs.		Conery vs. Rotchford, Brown	
Hébert et al. ....	404	& Co. ....	692
Chiapella, Parish of Iberia vs.	1143	Connell vs. Hill .....	251
Choppin & Beard vs. Louisiana		Conrad, Nalle & Cammack vs.	503
Levee Company .....	345	Cooke vs. Allison .....	963
Christian, State vs. ....	367	Cooper and Wife vs. Rhodes. .	533
Citizens' Bank and Sheriff, Aus-		Cramer, Sheriff, et al., Klein vs	372
tin vs. ....	689	Crescent City Live-Stock Land-	
Citizens' Bank of Louisiana et		ing and Slaughter-House Co.,	
al., Gillaspie vs. ....	1315	Smith vs. ....	1378
City of New Orleans, Bartley vs.	264	Crescent City Live Stock L'ding	
City of New Orleans, the First		and Slaughter-House Com-	
Presbyterian Church vs. ....	259	pany, Larrieux vs. ....	609
City of New Orleans, O'Neill vs.	220	Crescent City Live Stock L'ding	
City of New Orleans, Jefferson		and Slaughter-House Com-	
& Lake Pontchartrain R. R.		pany vs. Larrieux. ....	740
Co. vs. ....	211	Crescent City Live Stock and	
City of New Orleans, O'Hara vs.	152	Slaughter-House Company	
		vs. Larrieux .....	798

## TABLE OF CASES REPORTED.

xxi

PAGE.	PAGE.
Crescent-City Railroad Com- pany, Schwartz vs. .... 15	Executors of Boutté et al., Boutté et al. vs. .... 177
Cronan et al., Schwartz vs. .... 993	Executrix of Vance, Daugherty et al. vs. .... 1246
Cummings vs. Saux. .... 207	Farrar, Eskridge and Husband vs. .... 718
Cuney, Newman Brothers vs. .... 1201	Fasnacht, Fredericks vs. .... 117
Curtis, State vs. .... 1166	Fass vs. Rice Bros. & Co. .... 1278
Curtis, State vs. .... 814	Faulk, State vs. .... 831
Cushing et al. vs. Sambola & Ducros et al. .... 426	Favrot et al. vs. Parish of East Baton Rouge .... 606
Cutliff et al., Snider et al. vs. .... 1195	Fellows, Mills vs. .... 824
Daigre et al., Gay & Co. vs. .... 1007	Ferguson, Billgery vs. .... 84
Daspit et al., State ex rel. Mer- chant vs. .... 1112	Fernandez & Co., Marqueze & Co. vs. .... 195
Daugherty et al. vs. Executrix of Vance. .... 1246	Field et al., Follett et al. vs. .... 161
Davidson et al., City of New Orleans vs. .... 541	Finney & Byrnes, Kirkpatrick Mrs. vs. .... 223
Davidson and Hill et al., City of New Orleans vs. .... 554	First Presbyterian Church vs. City of New Orleans .... 259
D'Armond, Mitchell vs. .... 396	Fisher, State ex rel. Barrow vs. .... 514
Decklar vs. Frankengerger. .... 410	Fix vs. Succession of Dierker .... 175
Deffarge vs. Meyer. .... 548	Florat, Tutor, et al., Benedict vs. .... 1837
Delahoussaye, Parish of St. Martin ex rel. Baker vs. .... 1092	Follett et al. vs. Field et al. .... 161
Delahoussaye, Sr., Board of School Directors vs. .... 1097	Fontelleu et al., State ex rel. Schwing vs. .... 1122
Delavallade, Dobel vs. .... 604	Ford, State vs. .... 311
Denègre vs. Denègre. .... 275	Foreman vs. Saxon et al. .... 1117
De Poret vs. Gusman et al. .... 930	Forrester et al. vs. Mann .... 542
Ditch and Sheriff, Broussard vs. .... 1109	Forstall & Sons vs. Board of Liquidation. .... 1151
Doane et al., State vs. .... 1194	Foucher, Widow, Succession of. .... 1017
Dobel vs. Delavallade. .... 604	Foulhouze et al., Police July Parish of Plaquemines vs. .... 64
Dodd, Brown & Co. vs. Bishop & Co. et al. .... 1178	Fourchy, City of New Orleans vs. .... 910
Dorville, Succession of. .... 133	Fournet et al., State ex rel. Nelson vs. .... 1103
Dougart, Succession of. .... 268	Fræncke, Breaux, Fenner & Hall vs. .... 336
Dowling vs. Gally. .... 328	Frankengerger, Decklar vs. .... 410
Dowling, Gally vs. .... 323	Fredericks vs. Fasnacht. .... 117
Dubuclet, Harris vs. .... 662	Freret, Hickman vs. .... 1067
Duooing vs. Billgery. .... 250	Gaines vs. Succession of Del Campo .... 245
Dupuis, Mayor et al. of Breaux's Bridge vs. .... 1105	Gale, Succession of. .... 351
Durand et al., Tertron vs. .... 1108	Gally vs. Dowling. .... 323
Durkin, Succession of. .... 669	Gally, Dowling vs. .... 328
Durham vs. Heirs of Daugh- erty et al. .... 12.5	Garignes, Tax Collector, Wil- liams vs. .... 1094
Eastin, Sheriff, et al., Greig, Tutor, vs. .... 1130	Garrett, Executor, vs. Bonner. .... 1305
Edwards vs. Ricks et al. .... 926	Gartskamp, Hackenburg vs. .... 898
Ellerman vs. McMains et al. .... 190	Gay & Co. vs. Pike. .... 1332
Elliott, Musson & Co. vs. .... 147	Gay & Co. vs. Daigre et al. .... 1007
Eskridge and Husband vs. Far- rar. .... 718	George vs. Amacker. .... 390
Etna Life Insurance Company, Schneider vs. .... 1198	George, Pinard vs. .... 384
Evans and Husband vs. Payne & Harrison .... 498	

	PAGE.		PAGE.
George vs. Taylor.....	770	Helm et al. vs. Meyer, Weis & Co.....	943
Gerodias and Husband, Claverie vs.....	291	Herbert et al., Logan vs.....	727
Gerson vs. Hamilton.....	737	Herrmann & Vignes vs. Amédée.....	393
Gerson, Jr., vs. Jamar.....	1294	Herwig and Smith, Barkdull vs.....	618
Gest & Atkinson vs. N. O., St. Louis, and Chicago R. R. Co.	28	Hibard, Neel vs.....	808
Gettwerth vs. Hedden.....	30	Hibernia Insurance Company, O'Hern vs.....	959
Gillaspie vs. Citizens' Bank of Louisiana et al.....	1315	Hibernia Insurance Company, Magner vs.....	1357
Gill, Scovel vs.....	1207	Hickman vs. Freret et al.....	1067
Gilmore vs. Logan et al.....	1276	Hinckley, Succession of.....	1083
Goepper & Sors vs. Luase.....	392	Hill, Connell vs.....	251
Gonzales vs. Lindsay, Tax Collector.....	1085	Hodges, Tutrix, et al., Hamilton et al. vs.....	1290
Gordon vs. Goulé.....	138	Hoffman & Co., Serra é Hijo vs.....	67
Goulé, Gordon vs.....	138	Holten, Succession of Pinard vs.....	167
Gould, Meshew vs.....	163	Houston, Sheriff, State ex rel. Agusti vs.....	1174
Goux et al. vs. Moucla.....	743	Huey, Parish of Lincoln vs.....	1244
Greig, Tutor, vs. Eastin, Sheriff, et al.....	1130	Hyams, Succession of.....	460
Guilbeau, Administrator, Marais, Syndic, vs.....	1089	Ivens vs. Ivens & Co.....	249
Guilbeau et al. vs. Thibodeau et al.....	1099	Jackson, Succession of.....	463
Gunter, State vs.....	536	Jackson, Spears vs.....	523
Gusman et al., De Poret vs.....	930	Jamar, Gerson, Jr., vs.....	1294
Haber, Ozanne vs.....	1384	Jamison, Montross vs.....	172
Hackenburg vs. Gartkamp.....	898	Jefferson and Lake Pontchartrain Railway Co. vs. City of New Orleans.....	970
Hamilton et al., Carroll & Co. vs.....	520	Jefferson & Lake Pontchartrain R. R. Co. vs. City of New Orleans.....	211
Hamilton, Gerson vs.....	737	Jessie, State vs.....	1170
Hamilton et al. vs. Hodges et al.....	1290	Johnson vs. Mayer et al.....	1203
Hamlin et al. vs. Board of Liquidators.....	443	Johnson, State vs.....	305
Harrington & Co., Bancker vs.....	136	Johnson et al., State vs.....	881
Harris et al., State vs.....	90	Johnson, State vs.....	904
Harris, Burbank vs.....	487	Johnson, State vs.....	921
Harris vs. Dubuclet.....	662	Johns vs. Brinker.....	241
Harris, State vs.....	1340	Jones vs. Trustees of the Congregation of Mount Zion.....	711
Harrington vs. Barfield et al.....	1297	Judge of the Second District Court, State ex rel. McCloskey et al. vs.....	233
Harrison, State vs.....	1329	Judge of Second Judicial District, State ex rel. Borland vs.....	155
Hart et al. vs. St. Charles St. Railroad Company.....	758	Judge of the Third District Court, State ex rel. Boutroue vs.....	415
Hart & Hébert, Pike, Brother & Co. vs.....	868	Judge of Third District Court et al., State ex rel. Elder vs.....	229
Haynes vs. O'Neil, Sheriff, et al.....	1238	Judge of Fourth District Court, State ex rel. Baltor vs.....	599
Hébert et al., Briant vs.....	1127	Judge of Fifth District Court et al., State ex rel. Zuntz & Sporl vs.....	582
Hebert, Chatefond et al. vs.....	404		
Hedden, Gettwerth vs.....	30		
Heffner, Sheriff, et al., White & Barrett vs.....	1280		
Heffner, Sheriff, Van Loan vs.....	1213		
Heffner, Sheriff, et al., Williams vs.....	1193		
Heirs of Daugherty et al., Durham vs.....	1255		

PAGE.	PAGE.
Judge Sixth District Court et al., State ex rel. Kramer vs. 1014	Laurent vs. Beelman and Beelman..... 363
Judge of Sixth District Court, State ex rel. La. B'd of Trustees for Blind vs. .... 1026	Ledoux vs. Burton..... 576
Judge of Sixth District Court, State ex rel. Becker vs. .... 1350	Lehman, Abraham & Co. vs. Levy and Husband..... 745
Judge of the Fourteenth Judicial District, State ex rel. Williamson vs. .... 314	Leppelman, Succession of .... 468
Judge of the Parish Court of Ouachita, State ex rel. Ray vs 183	Lesassier & Binder vs. Board of Liquidation..... 611
Judge of the Superior District Court, State ex rel. Maurice vs. .... 603	Leveau, Beauregard vs. .... 302
Jumel, State ex rel. Hartwell vs 421	Levy and Husband, Lehman, Abraham & Co. vs. .... 745
Jumel, State ex rel. Paris vs. . 235	Lindsay, Tax Collector, Gonzales vs. .... 1085
Jumel, State ex rel. Samuel vs 339	Lion and Husband, Murrell vs. .... 255
Jurey & Gillis vs. Allison & Co. and Sheriff. .... 1234	Lippmins vs. McCranie..... 1251
Kasa, Barth vs. .... 940	Liquidators of Hart & Hébert, Blouin et al. vs. .... 714
Kaufman, Sheriff, Bowman vs. 1021	Liverpool, London & Globe Insurance Co., Weight et al. vs. 1186
Kelly vs. Sandidge et al. .... 1190	Lochte & Cordes and Sheriff, Bauer vs. .... 685
Kern et al., Bloom & Co. vs. . 1263	Logan, Gilmore vs. .... 1276
King, Perret vs. .... 1368	Logan vs. Hébert et al. .... 727
Finney, Smith vs. .... 332	Lord Cecil et al. vs. the Board of Liquidation..... 34
Kirkpatrick, Sheriff, et al., Martin vs. .... 1214	Louisiana Levee Co., Choppin & Beard vs. .... 345
Kirkpatrick, Mrs. vs. Finney & Byrnes..... 223	Louisiana Levee Co., Montgomery vs. .... 607
Klein vs. Buckner et al. .... 680	Louisiana National Bank vs. the Board of Liquidation... 1356
Klein vs. Cramer, Sheriff, et al. 372	Loudon and Sheriff, Wade vs. 660
Labranche, Tax Collector, Luling vs. .... 972	Lovell vs. Payne et al. .... 511
LaChambre & Co. vs. Cole.... 961	Lowry, Rapp vs. .... 1272
Lacoume, Stewart vs. .... 157	Ludeling et al., Blanton vs. . 1232
Lacroix, Succession of. .... 924	Lusk vs. Succession of Benton 686
Lafargue, Bradford vs. .... 432	Lusse, Goepper & Sons vs. . . 392
Lafayette Fire Insurance Co. vs. Remmers..... 1347	Luling vs. Labranche, Tax Collector..... 972
Lafitte & Co., Chaffraix & Agar vs. .... 631	Lyons et al., Teal et al. vs. . 1140
Lalamie, Administrator, Méche et al. vs. .... 1136	Maduel, Executor, et al. vs. Tuyes et al. .... 1404
Landry vs. Victor..... 1041	Magner vs. Hibernia Insurance Company..... 1357
Lannes et al., Workingmen's Bank vs. .... 871	Mahan et al., Benton vs. .... 1401
Lapene, Barrow vs. .... 310	Mailhot vs. Pugh ..... 1359
Larrieux vs. Crescent City Live Stock Landing and Slaughter-House Company..... 609	Malloy, State vs. .... 61
Larrieux, Crescent City Live Stock Landing and Slaughter-House Company vs. .... 740	Mann, Forrester et al. vs. .... 542
Larrieux, Crescent City Live Stock and Slaughter-House Company vs. .... 798	Mann, Richardson vs. .... 1060
	Maraist, Fournet & Co. vs. Callier, Administratrix..... 1087
	Maraist, Syndic, vs. Guilbeau, Administrator..... 1089
	Marbury et al. vs. Pace..... 1330
	Marks, State ex rel. Duffel vs. 70
	Marks, State ex rel. Duffel vs. 97
	Marino, Sattler & Co. vs. .... 355

	PAGE.		PAGE.
Marin et al. vs. Sheriff and City of New Orleans .....	293	Morris vs. Womble, Sheriff ...	1312
Martin vs. Kirkpatrick, Sheriff, et al. ....	1214	Morris vs. Bienvenu et al. ....	878
Martin, Peterkin vs. ....	894	Morrison, State vs. ....	817
Marqueze & Co. vs. Fernandez & Co. ....	195	Moucla, Goux et al. vs. ....	743
Martinez et al. vs. Succession of Vives. ....	818	Murrell vs. Lion and Husband	255
Mayer et al., Johnson vs. ....	1203	Musson & Co. vs. Elliott. ....	147
Mayor and Administrators of N. O., State ex rel. Carondelet Canal and Navigation Co. vs.	129	Nalle vs. Baird. ....	1148
Mayor et al. of Breaux's Bridge vs. Dupuis. ....	1105	Nalle & Cammack vs. Conrad.	503
Mayronne, Tutor, vs. Wagga- man et al. ....	974	Nalle & Cammack, Peet, Yale & Bowling vs. ....	949
McCaffrey, Administrator, vs. Cavanac, Administrator. ....	882	Neel vs. Hibard. ....	808
McCranie, Lippmins vs. ....	1251	Nelson, Bussy & Co., vs. ....	25
McElvin vs. Taylor et al. ....	552	Newman Brothers vs. Cuney ..	1201
McKnight vs. Parish of Grant	361	New-Orleans Canal and Bank- ing Company vs. City of New Orleans. ....	1371
McLear & Kendall vs. Succes- sion of Hunsicker. ....	1225	N. O., St. Louis, and Chicago R. R. Co., Gest & Atkinson vs. .	28
McMains et al., Ellerman vs. .	190	N. O. & Carrollton R. R. Co., State ex rel. Martin et al. vs	308
McVay, Sewell vs. ....	673	Newton et al., State vs. ....	1253
Mechanics' and Traders' Bank, Calhoun vs. ....	772	Nicholls et al., State ex rel. New Orleans Pacific R. R. Co. vs.	1217
Méche et al. vs. Lalamie, Ad- ministrator. ....	1136	Nicholls, Governor, et al., State ex rel. New Orleans Pacific Railway Co. vs. ....	980
Merchants' Mutual Insurance Company, Werlein vs. ....	1399	Nicol and Bowman, State vs. .	628
Merchants' Mutual Insurance Company, Allen vs. ....	1386	Norwood, Soulé vs. ....	486
Merchants' and Traders' Insu- rance Company, City of New Orleans vs. ....	876	Nugent vs. Stark et al. ....	492
Meshew vs. Gould. ....	163	Ocean Dry-Dock Co., Cochran vs. ....	1365
Messick, Sheriff, et al., Bass vs.	373	O'Connor et al. vs. Sheriff et al	441
Meyer vs. Deffarge. ....	548	Oglesby & Co., Peterkin vs. .	907
Meyer, Weis & Co., Helm et al. vs. ....	943	O'Hara vs. City of New Orleans	152
Michon, Succession of. ....	213	O'Hern vs. Hibernia Insurance Company. ....	959
Mills, Agelasto vs. ....	1345	O'Neil, Sheriff, et al., Haynes vs.	1238
Mills vs. Fellows. ....	824	O'Neill vs. City of New Orleans	220
Minors Kearney and Lake, Blake et al. vs. ....	388	Outs, State vs. ....	1155
Mitchell vs. D'Armond. ....	396	Ozanne vs. Haber. ....	1384
Mix, Sheriff, et al., Stewart vs.	1036	Pace, Marbury et al. vs. ....	1330
Monatt vs. Parker. ....	585	Pargoud vs. Richardson. ....	1286
Monroe, State of Louisiana vs.	1241	Parish of Lincoln vs. Huey. ....	1244
Montague et al. vs. Weil & Bro.	50	Parish of St. Martin ex rel. Baker vs. Delahoussaye. ....	1092
Montross vs. Jamison. ....	172	Parish of Madison, Tunstall vs. ....	471
Montgomery vs. the Louisiana Levee Company. ....	607	Parish of Iberia vs. Chiapella.	1143
Moore & Coleman vs. Rush. ....	1157	Parish of Plaquemines vs. Bow- man. ....	1403
Morère et al., Porter vs. ....	230	Parish of Grant, McKnight vs.	361
Morgan, Chaffe & Bro. vs. ....	1307	Parish Judge of Iberville Par- ish, State ex rel. Ventriss vs	307
Moriarty et al., Reardon vs. .	120	Parish Judge of St. Martin Par- ish, State ex rel. Durand et al. vs. ....	282



TABLE OF CASES REPORTED.

xxv

	PAGE.		PAGE.
Parish of Madison, Smith vs..	461	Richardson et al., Williamson vs.....	1163
Parish of East Baton Rouge, Favrot et al. vs .....	606	Richards, Renshaw vs.....	398
Parker, Bienvenu vs .....	160	Ricks et al., Edwards vs.....	926
Parker, Monatt vs.....	585	Robertson, State vs .....	340
Parker, State ex rel. Wilson vs.	1182	Rogillio et al., State ex rel. Slocomb vs.....	833
Patrick, Succession of.....	1071	Rolle, State vs.....	991
Payne & Harrison, Evans and Husband vs.....	498	Ross, State vs.....	1154
Payne et al., Lovell vs.....	511	Rotchford, Brown & Co., Conery vs.....	692
Pearce, Succession of.....	1168	Ruff State, and Town of Plaquemines vs.....	497
Peck, State ex rel. Lisso vs...	280	Rush, Moore & Coleman vs...	1157
Peet, Yale & Bowling vs. Nalle & Cammack .....	949	Ryan, State vs.....	1176
Pendegast vs. Schwartz et al..	590		
Perret vs. King .....	1368	Sales et al., State vs.....	916
Peterkin vs. Oglesby & Co....	907	Saloy vs. Collins .....	63
Peterkin vs. Martin.....	894	Sambola & Ducros et al., Cushing et al. vs.....	426
Picard & Weil vs. Wade.....	623	Sandel, Schmidt & Zeigler vs.	353
Pickett, Woods & Bros. vs....	1095	Sandidge et al., Kelly vs.....	1190
Pike, Brother & Co. vs. Hart & Hébert.....	868	Sanford, Compton vs.....	838
Pike, Gay & Co. vs.....	1332	Sarpy et al., Boulit vs.....	494
Pilsbury, Mayor, State ex rel. Carondelet Canal and Navigation Co. vs.....	705	Sattler & Co. vs. Marino.....	355
Pinard vs. George.....	384	Saux, Cummings vs .....	207
Pointer, Succession of.....	370	Saxon et al., Foreman vs.....	1117
Police Jury of Terrebonne Parish, State ex rel. Rabasse vs	287	Schmidt & Zeigler vs. Sandel	353
Police Jury Parish of Plaquemines vs. Foulhouze et al...	64	Schneider vs. Etna Life Insurance Company .....	1198
Porter vs. Morère et al.....	230	School Board vs. Weber et al.	593
Price et al., Soye vs.....	93	Schwartz vs. Cronan et al....	993
Puckett, Stuffer vs.....	811	Schwartz vs. the Crescent-City Railroad Company.....	15
Pugh, Mailhot vs.....	1359	Schwartz et al., Pendegast vs.	590
		Scott & Williams vs. Sheriff...	580
Querin, Administratrix, vs. Carlin .....	1131	Scovel vs. Gill.....	1207
Queyrouze & Bois et al. vs.	1114	Serra é Hijo vs. Hoffman & Co	67
Thibodeaux et al.....	1114	Sevin & Gourdain vs. Caillouet	528
Quin, Succession of .....	947	Sewell et al., Thoms vs.....	359
		Sewell vs. McVay.....	673
Ranlett vs. Collier White Lead Company.....	56	Sexton vs. Sullivan et al.....	342
Rapp vs. Lowry.....	1272	Seymour, Buckley vs.....	1341
Reardon vs. Moriarty et al...	120	Sharkey, Tutor, vs. Bankston	891
Recorder of First Recorder's Court, State ex rel. Geale vs.	450	Shay, State vs .....	114
Remmers, Lafayette Fire Insurance Co. vs.....	1347	Shepard, Catherwood & Co. vs	677
Renshaw vs. Richards.....	398	Sheriff and City of New Orleans, Marin et al. vs.....	293
Renshaw vs. Stafford.....	853	Sheriff, Scott & Williams vs...	580
Rhodes, Cooper and Wife vs..	533	Sheriff et al., O'Connor et al. vs	441
Rice Bros. & Co., Fass vs.....	1278	Sies, State vs.....	918
Richardson, et al., Strother vs.	1269	Simien, State vs .....	296
Richardson, Pargoud vs.....	1286	Smith vs. Crescent City Live-Stock L'ding and Slaughter-House Company.....	1378
Richardson vs. Mann.....	1060	Smith vs. Kinney .....	332
Richardson et al., Cobb vs....	1228	Smith, State of Louisiana vs..	457
		Smith vs. Parish of Madison..	461
		Smith, State vs .....	846

	PAGE.		PAGE.
Snider et al. vs. Collins, Sheriff, et al. ....	1236	State vs. Tennant et al. ....	852
Snider et al. vs. Cutliff et al. ....	1195	State vs. Thomas. ....	301
Snow, State vs. ....	401	State vs. Thomas. ....	600
Soulé vs. Norwood. ....	486	State vs. Tilman. ....	1249
Soye vs. Price et al. ....	93	State vs. Washington et al. ...	49
Spears vs. Jackson. ....	523	State vs. White. ....	364
Spencer, State vs. ....	362	State vs. Williams. ....	1028
Stacey & Poland, Bayly & Pond vs. ....	1210	State vs. Williams. ....	1162
Stafford, Renshaw vs. ....	853	State vs. Williams. ....	842
Stark et al., Nugent vs. ....	492	State vs. Weasel et al. ....	919
State of Louisiana vs. Monroe. ....	1241	State vs. Von Sachs et al. ....	942
State of Louisiana vs. Smith. ....	457	State vs. Ziord, alias Warren. ....	867
State, and Town of Plaque- mines vs. Ruff. ....	497	State ex rel. Barrow vs. Fisher. ....	514
State vs. Anderson. ....	557	State ex rel. Agustí vs. Hous- ton, Sheriff. ....	1174
State vs. Baker. ....	1134	State ex rel. Becker vs. Judge Sixth District Court. ....	1350
State vs. Beatty, alias, Brown et al. ....	1266	State ex rel. Borland vs. Judge of Second Judicial District. ....	155
State vs. Becker. ....	682	State ex rel. Baltor vs. Judge of Fourth District Court. ....	599
State vs. Briscoe. ....	433	State ex rel. Boudroue vs. the Judge of the Third District Court. ....	415
State vs. Burns. ....	679	State ex rel. Board of Super- visors vs. Board of Liquida- tors. ....	816
State vs. Bradley et al. ....	326	State ex rel. Coce vs. Chargois. ....	1102
State vs. Brooks. ....	335	State ex rel. Collens vs. Jumel. ....	861
State vs. Christian. ....	367	State ex rel. Carondelet Canal and Navigating Co. vs. Mayor and Administrators of N. O. ....	129
State vs. Clifton. ....	951	State ex rel. Carondelet Canal and Navigation Co. vs. Pils- bury, Mayor. ....	705
State vs. Curtis. ....	814	State ex rel. Duffel vs. Marks. ....	97
State vs. Curtis. ....	1166	State ex rel. Duffel vs. Marks. ....	70
State vs. Doane et al. ....	1194	State ex rel. Durand et al. vs. Parish Judge of St. Martin Parish. ....	282
State vs. Faulk. ....	831	State ex rel. Elder vs. Judge of Third District Court et al. ....	229
State vs. Ford. ....	311	State ex rel. Geale vs. Recorder of First Recorder's Court. ....	450
State vs. Gunter. ....	536	State ex rel. Hartwell vs. Jumel. ....	421
State vs. Harris et al. ....	90	State ex rel. Houston vs. City of New Orleans. ....	82
State vs. Harrison. ....	1329	State ex rel. Kramer vs. Judge Sixth District Court et al. ....	1014
State vs. Harris. ....	1340	State ex rel. Lacaze et al. vs. Cavanac. ....	237
State vs. Jessie. ....	1170	State ex rel. Lannes et al. vs. Attorney General. ....	954
State vs. Johnson et al. ....	881	State ex rel. La. B'd Trustees for Blind vs. Judge of Sixth District Court. ....	1026
State vs. Johnson. ....	305	State ex rel. Lisso vs. Peck. ....	280
State vs. Johnson. ....	921	State ex rel. Martin et al. vs. N. O. & Carrollton R. R. Co. ....	308
State vs. Johnson. ....	904		
State vs. Malloy. ....	61		
State vs. Morrison. ....	817		
State vs. Newton et al. ....	1253		
State vs. Nicol and Bowman. ....	628		
State vs. Outs. ....	1155		
State vs. Robertson. ....	340		
State vs. Rolle. ....	991		
State vs. Ross. ....	1154		
State vs. Ryan. ....	1176		
State vs. Simien. ....	296		
State vs. Snow. ....	401		
State vs. Spencer. ....	362		
State vs. Shay. ....	114		
State vs. Sies. ....	918		
State vs. Sales et al. ....	916		
State vs. Smith. ....	846		
State vs. Swayze. ....	1323		
State vs. Tazwell et al. ....	884		

	PAGE.		PAGE.
State ex rel. Maurice vs. Judge of Superior District Court..	603	Succession of Hoover et al. vs. York & Hoover.....	752
State ex rel. McCloskey et al. vs. Judge of the Second District Court.....	233	Succession of Hyams .....	460
State ex rel. Merchant vs. Daspit et al.....	1112	Succession of Hunsicker, Mc-Lear & Kendall vs.....	1225
State ex rel. New-Orleans Pacific R. R. Co. vs. Nicholls et al.	1217	Succession of Hinckley.....	1083
State ex rel. N. O. City R. R. Co. vs. Board of Assessors.....	261	Succession of Jackson.....	463
State ex rel. New-Orleans Pacific Railway Co. vs. Nicholls, Governor, et al.....	980	Succession of Lacroix.....	924
State ex rel. Nelson vs. Fournet et al.....	1103	Succession of Leppelman.....	468
State ex rel. Paris vs. Jumel..	235	Succession of Michon.....	213
State ex rel. Rills vs. Barrow..	657	Succession of M. Del Campo, Gaines vs.....	245
State ex rel. Rabasse vs. Police Jury of Terrebonne Parish.	287	Succession of Pinard vs. Holten	167
State ex rel. Ray vs. Judge of the Parish Court of Ouachita	183	Succession of Pointer.....	370
State ex rel. Samuel vs. Jumel	339	Succession of Pearce.....	1168
State ex rel. Schwing vs. Fontelleu et al.....	1122	Succession of Patrick.....	1071
State ex rel. Strauss vs. Brown	78	Succession of Quin.....	947
State ex rel. Slocomb vs. Rogilio et al.....	833	Sullivan et al., Sexton vs.....	342
State ex rel. Ventriess vs. Parish Judge of Iberville Parish	307	Succession of Tabarry.....	187
State ex rel. Williamson vs. the Judge of the Fourteenth Judicial District.....	314	Succession of Woods.....	1002
State ex rel. Wilson vs. Parker.	1182	Succession of Widow Foucher.	1017
State ex rel. Zuntz & Spori vs. Judge of the Fifth District		Succession of Winn.....	702
Stewart vs. Lacoume.....	157	Succession of Zacharie.....	1260
Stewart vs. Mix, Sheriff, et al.	1036	Summers & Brannins vs. Clark	436
Court et al.....	582	Swayze, State vs.....	1323
St. Charles St. R. R. Co., Hart vs	758	Tabarry, Succession of.....	187
Strother vs. Richardson, et al.	1269	Tax Collector, Clinton and Port Hudson R. R. Company vs..	626
Stuffer vs. Puckett.....	811	Taylor et al., McElvin vs.....	552
Succession of Anselm.....	1145	Taylor, George vs.....	770
Succession of Bayly.....	75	Tazwell, State vs.....	884
Succession of Butler.....	887	Teal et al. vs. Lyons et al.....	1140
Succession of Boutté.....	128	Tennant et al., State vs.....	852
Succession of Bollinger.....	193	Tertrou vs. Durand et al....	1108
Succession of Benton, Lusk vs	686	Thibodeaux vs. Comeau and Wife .....	1119
Succession of Bougère.....	422	Thibodeau et al., Guilbeau et al. vs.....	1099
Succession of Blasini, Blasini et al. vs.....	1388	Thibodeaux et al., Queyrouze & Bois et al. vs.....	1114
Succession of Bauman.....	1138	Tilman, State vs.....	1249
Succession of Baily vs. Becnel.	1032	Thomas, State vs.....	600
Succession of Clark.....	801	Thomas, State vs.....	301
Succession of Durkin.....	669	Thoms vs. Sewell et al.....	359
Succession of Dougart.....	268	Trustees of the Congregation of Mount Zion, Jones vs..	711
Succession of Dierker, Fix vs.	175	Tunstall vs. Parish of Madison	471
Succession of Dorville.....	133	Tuyes et al., Maduel et al. vs.	1404
Succession of Gale.....	351	Van Loan vs. Heffner, Sheriff.	1213
		Van Wickle vs. Violet and Wife.	1106
		Ventress, Executrix, vs. Brown et al.....	1012
		Vickers, Worrell vs.....	202
		Victor, Landry vs.....	1041
		Violet and Wife, Van Wickle vs.	1106
		Vives, Succession of, Martinez et al. vs.....	818

	PAGE.		PAGE.
Von Sachs et al., State vs. ....	942	Williams vs. Garignes, Tax Col- lector. ....	1094
Vorster et al., Broadway Sav- ings-Bank of St. Louis vs. ...	587	Williams vs. Heffner, Sheriff, et al. ....	1193
Wade, Picard & Weil vs. ....	623	Williams, State vs. ....	1162
Wade vs. Loudon and Sheriff. ...	669	Williamson vs. Richardson et al. ....	1163
Waggaman et al., Mayronne, Tutor, et al. vs. ....	974	Williams, State vs. ....	1028
Ward, Tutor, Willis vs. ....	1282	Williams, State vs. ....	842
Washington et al., State vs. ...	49	Willis vs. Ward, Tutor. ....	1282
Watson vs. Bondurant. ....	1	Winn, Succession of. ....	702
Watkins et al., Brice vs. ....	21	Wolf & Levi, Aurich vs. ....	375
Weasel et al., State vs. ....	919	Womble, Sheriff, Morris vs. ...	1312
Weber et al., School Board vs. ...	593	Wood, J., to the Court. ....	672
Weight et al. vs. Liverpool, London & Globe Insurance Company. ....	1186	Woods & Bros. vs. Pickett. ...	1095
Weil & Bro., Montague et al. vs. ....	50	Woods, Succession of. ....	1002
Weill et al., Bevans vs. ....	185	Woolfolk vs. Woolfolk. ....	139
Wells, Jr., Executor, vs. Wells ...	935	Workingmen's Bank vs. Lan- nes et al. ....	871
Werlein vs. Merchants' Mutual Insurance Company. ....	1399	Worrell vs. Vickers. ....	202
White & Barrett vs. Heffner, Sheriff, et al. ....	1280	York & Hoover, Succession of Hoover vs. ....	752
White, State vs. ....	364	Zacharie, Succession of. ....	1260
		Ziord, alias Warren, State vs. ...	867

## LIST OF CASES NOT REPORTED.

---

### NEW ORLEANS.

Alexander, J. M., vs. Tenant, W., et al.  
Ange, J., vs. Variol, M.  
Arbour, J. & O., Blackie, W., vs.  
Bassetti, L., vs. Caboche, L.  
Bass & Houghton, State vs.  
Behan, W. J., vs. N. O. city of.  
Blackie, W., vs. Arbour, J. & O.  
Bloomer et al., State ex rel. Moxon, J. E., vs.  
Boisdoré, M., vs. Dorville, A. & N., et al.  
Boisse, O., vs. Dickson, Widow.  
Boyé vs. Miles, T.  
Brewster, R., et al., Hays, J. J., vs.  
Britton & Moore, Bush vs.  
Brown, J. N., Succession of.  
Brown, Mathilda, Succession of.  
Brown, J. D., et al., Ventress, J. A., ex., vs.  
Bruen, Z., Lauson, S., vs.  
Burkhardt, J. J., vs. Langles, J., et al.  
Bush vs. Britton & Moore.  
Caboche, L., et al., Bassetti, L., vs.  
Carey & Co. vs. Price, Hine & Tupper.  
Cannon, J. W., State vs.  
Casse, P., Wood, H. A., vs.  
Chism & Boyd vs. Conrad, A. L. D., et al.  
Clarkson, L. B., vs. Sparrow, Mrs. M.  
Clark, P., city of N. O. vs.  
Clay, J. R. et al., DeBlanc, Mrs. J. V., vs.  
Clerk Sixth District Court, State ex rel. Cooney, J., vs.  
Connell, N., vs. Davidson, J. C.  
Conrad, A. L. D., et al., Chism & Boyd vs.  
Conery, A., Green, A. E., vs.  
Collins, J. K. & Bro., Tilton, F. W., vs.  
Couleau, E., vs. Warren, Atkinson & Co.  
Coudreau, Henrietta, Succession of.  
Cramer, E. M., vs. Succession of Crane, A. F.

---

Crescent City L. S. L. & S. H. Co. vs. Kerner, W. C.  
Crescent City L. S. L. & S. H. Co., Durbridge vs.  
Crooks, H. M., vs. Thorn, C.  
Davidson, J. C., Connell, N., vs.  
Davis, G. M., et al., Police Jury Concordia Parish vs.  
DeBlanc, Mrs. J., vs. Clay, J. R., et al.  
Dennison, Jeff, State vs.  
Dennee, R. S., Everett, C., vs.  
Dickson, Widow, Boisse, O., vs.  
Dobbins, J. G., vs. Lyons, P., et al.  
Domingo, J., Font, S. J., vs.  
Dorville, A. & N., Boisdoré, M., vs.  
Ducre, M., vs. Mestier, L., et al.  
Durbridge vs. Crescent City L. S. L. & S. H. Co.  
Durbridge, W., Smith J., vs.  
Eagan, E. A., Mitchell, E. W., vs.  
East, Mrs. F. vs. Kernan & McVea.  
Edwards, J. S., vs. Warren, Atkinson & Co.  
Elmore, W. A., vs. Jumel.  
Everett, Chas., vs. Dennee, R. S.  
Fassman, Henry, Succession of.  
Fisk, F. M., Wheeler & Pratt vs.  
Fontenot, O. B., vs. Warren, Atkinson & Co.  
Font, S. J., vs. Domingo, J.  
Forman, B. R., City of New Orleans vs.  
French, U., vs. Rigsby.  
Gallagher, M., State vs.  
Garvey, J. P., vs. Price, Hine & Tupper.  
Gaudet, F. B., vs. Succession of Courotte.  
Green, A. E., vs. Conery, A.  
Hall, Richard, State vs.  
Handy, Sheriff, Lacoste, J., vs.  
Hardesty, Mrs. E. B., Succession of.  
Hays, J. J., vs. Brewster, R., et al.  
Hebert, M. M., vs. Hebert, R., Tutor.  
Hebert, R., Tutor, Hebert, M. M., vs.  
Heft, P., Sr., Staiger, J. A., et al., vs.  
Henderson, W., vs. Price, Hine & Tupper et al.  
Hibernia, Ins. Co., O'Hern, W. P., vs.  
Hilburn, C., Well, E., vs.  
Hynson, R. C., Succession of.  
Hynson, W. A., Succession of.  
Judge Sixteenth Judicial Court, State ex rel. Schwing vs.  
Judge Second District Court, State ex rel. Mason et al. vs.

Judge Third District Court, State ex rel. Larrieux vs.  
Judge Fourth District Court, State ex rel. Haley, C. C., vs.  
Judge Second District Court, State ex rel. Mason, W. R., vs.  
Judge Fourth District Court, State (Houston, W. T.,) ex rel. Harman vs.  
Jumel, Auditor, Elmore, W. A., vs.  
Kahnback, Mrs. A., Spahr, C., Ex., vs.  
Kernan & McVea, East, Mrs. F., vs.  
Kerner, W. C., Crescent City L. S. L. and S. H. Co. vs.  
Kouns & Moran, Lawson, S., vs.  
Lacroix, F., et al., Succession of Cordeviola, E. vs.  
Labarre, T. J., Police Jury Jefferson Parish vs.  
Lacoste, J., vs. Handy, Sheriff, et al.  
Langles, J., et al., Burkhardt, J. J., vs.  
Lawson, S., vs. Bruen, Z.  
Lawson, S., vs. Kouns & Moran.  
Lawrence, H., vs. Lelieve & Co.  
LeBlanc, P., vs. Selby, N. C., et al.  
Lehman, A. & Co. vs. Payne, J. A., et al.  
Lelieve & Co., Lawrence, H., vs.  
Lyons, P., et al., Dobbins, J. G., vs.  
Maclin, L. C., vs. State of Louisiana.  
Maynard, Mrs. M. J., Merriam, C. L., vs.  
McCloskey, Hugh, Succession of.  
Merriam, C. L., vs. Maynard, Mrs. M. J.  
Merrick, E. T., Ex. North, D. B., vs.  
Mestier, L., et al., Ducre, M., vs.  
Miles, Isham, State vs.  
Miles, T., Boyé vs.  
Michinard, F., et al., Reichard, A., vs.  
Mitchell, E. W., vs. Eagan, E. A.  
Montane, J., vs. Woerner, A., et al.  
Morgan, Henry, State vs.  
Mueller, Nelson, H., vs.  
Nelson, H., vs. Mueller.  
New Orleans, city of, Behan, W. J., vs.  
New Orleans Canal and Banking Co. vs. City of New Orleans.  
New Orleans, city of, New Orleans Canal and Banking Co. vs.  
New Orleans, city of, vs. Clark, P.  
New Orleans, city of, vs. Forman, B. R.  
New Orleans, city of, vs. Nott, E.  
New Orleans, city of, vs. Nott, W. A.  
Nivette, B., Shawcrop & Co. vs.  
North, D. B. vs. Merrick, E. T., Ex.  
Nott, E., City of New Orleans vs.

Nott, W. A., City of New Orleans vs.  
O'Hern, W. P., vs. Hibernia Ins. Co. et al.  
Payne, J. A., et al., Lehman, A. & Co., vs.  
Peoples' Bank, Popovich, M., vs.  
Pipes, J. W., Succession of.  
Police Jury Jefferson Parish et al. vs. Labarre, T. J.  
Police Jury Concordia Parish vs. Davis, G. M., et al.  
Popovich, M., vs. Peoples' Bank.  
Prague, R., vs. Walliche, E. F., et al.  
Price, Hine & Tupper et al., Henderson, W., vs.  
Price, Hine & Tupper, Carey & Co., vs.  
Price, Hine & Tupper, Garvey, J. P., vs.  
Recorder of First Recorder's Court, State ex rel. Geale vs.  
Reichard, A., vs. Michinard, F., et al.  
Rigsby, French, U., vs.  
Seghers, J., vs. Soulé, N., et al.  
Seiss, S., vs. Seiss, D.  
Selby, N. C., et al., LeBlanc, P., vs.  
Shawcrop & Co. vs. Nivette.  
Shepperd, Henry D., Succession of.  
Sheriff et al., State ex rel. Schwing vs.  
Smith, J., vs. Durbidge, W.  
Soulé, N., et al., Seghers, J., vs.  
Spahr, C., vs. Kahnback, Mrs. A.  
Sparrow, Mrs. M., Clarkson, L. B., vs.  
Staiger, J. A., vs. Heft, P., Sr.  
State ex rel. Cooney vs. Clerk Sixth District Court.  
State ex rel. Berens vs. Judge Fourth District Court.  
State ex rel. Geale, H., vs. Recorder.  
State ex rel. Haley vs. Judge Fourth District Court.  
State ex rel. Harmon vs. Houston, W. T.  
State ex rel. Larrieux vs. Judge Third District Court.  
State ex rel. Mason vs. Judge Second District Court.  
State ex rel. Mason vs. Judge Second District Court.  
State ex rel. Moxon vs. Board Liquidators.  
State ex rel. Schwing vs. Judge Sixteenth Judicial District Court.  
State ex rel. Schwing vs. Sheriff et al.  
State vs. Bass & Houghton.  
State vs. Bloomer et al.  
State vs. Cannon, J. W.  
State vs. Dennison, Jeff.  
State vs. Gallagher, M.  
State vs. Hall, Richard.  
State, Maclin, L. C., vs.



State vs. Miles, Isham.  
State vs. Morgan, Henry.  
State vs. Thompson, P.  
State vs. Wells, W.  
Succession of Brown, J. N.  
Succession of Brown, Mathilda.  
Succession of Cordeviola, A., vs. Lacroix, F., et al.  
Succession of Coudreau, Henriette.  
Succession of Courotte, Gaudet, F. B., vs.  
Succession of Crane, A. F., Cramer, E. M., vs.  
Succession of Fassman, Henry.  
Succession of Hardesty, Mrs. E. B.  
Succession of Hynson, R. C.  
Succession of Hynson, Mary.  
Succession of McCloskey, Hugh.  
Succession of Pipes, J. W.  
Succession of Shepperd, Henry D.  
Succession of Woods, R. H.  
Tenant, W., et al., Alexander, J. M., vs.  
Ternoir, J., Weaver, D., Executor, vs.  
Thompson, P., State vs.  
Thompson, K. K., vs. Watson, J. G.  
Thorn, C., Crooks, H. M., vs.  
Variol, M., Augé, J., vs.  
Ventress, J. A., Executor, vs. Brown, J. D., et al.  
Walliche, E. F., et al, Prague, R., vs.  
Warren, Atkinson & Co., Young, L., vs.  
Warren, Atkinson & Co., Couleau, E., vs.  
Warren, Atkinson & Co., Edwards, J. S., vs.  
Warren, Atkinson & Co., Fontenot, O. B., vs.  
Watson, Mrs. A., vs. Winter & Hunter.  
Watson, J. G., Thompson, K. K., vs.  
Weaver, D., Executor, vs. Ternoir, J.  
Well, E., vs. Hilburn, C.  
Wells, William, State vs.  
Wheeler & Pratt vs. Fisk, F. M.  
Whittaker, H., vs. Wilson, J. H.  
Wilson, J. H., Whittaker, H., vs.  
Winter & Hunter, Watson, Mrs. A., vs.  
Woerner, A., et al., Montane, J., vs.  
Woods, R. H., Succession of.  
Wood, H. A., Casse, P.  
Young, L., vs. Warren, Atkinson & Co.

## OPELOUSAS.

Baton Rouge, Mayor of, vs. Delhommer, C.  
Blanchet, Carmelite, Succession of.  
Breaux's Bridge, Mayor of, vs. Guidry, E., Jr.  
Comeau, Sheriff, et al., Halsey, W. F., vs.  
Delhommer, C., Baton Rouge, Mayor of, vs.  
Ditch, Leo, Succession of.  
Durand, C., Jr., Succession of.  
Gordy, Sheriff, et al., Mossy, J., vs.  
Guidry, E., Jr., Breaux's Bridge, Mayor of, vs.  
Guidry, Julien, et al., State vs.  
Halsey, W. F., vs. Comeau, J. B., Sheriff, et al.  
Lyons, J., and Wife, Succession of.  
Moss, A., vs. Munn, J. & Co.  
Mossy, J., vs. Gordy, Sheriff, et al.  
Munn, J. & Co., Moss, A., vs.  
Nixon, S. A., vs. Tendall & Hill.  
Ogden, J. N., vs. Osborn, S. W.  
Osborn, S. W., Ogden, J. N., vs.  
State vs. Guidry, Julien, et al.  
Succession of Blanchet, Carmelite.  
Succession of Durand, C., Jr.  
Succession of Ditch, Leo.  
Succession of Lyons, J., and Wife.  
Succession of Wells, David.  
Tendall & Hill, Nixon, S. A., vs.  
Wells, David, Succession of.

## MONROE.

Berwin, M., vs. McLemore, H. W.  
Blanchin & Giraud vs. Whited, S., et al.  
Board of Liquidators, State ex rel. Forstall & Sons vs.  
Bruce, C. M., vs. Bruce, W. G., et al.  
Byrd, Frank P., State vs.  
Cain, J., et al., Monroe, Mayor, etc., vs.  
Chaffe, C., Williams, John S., vs.  
Collins, W. N., Sheriff, et al., Rains, M. A., vs.  
Clary, J. W., State vs.  
Evans, C. M., Succession of.  
Gilmer, T. M., et al., Templeman, LeRoy, vs.  
Hebert, Gabriel, State vs.  
Heffner, Sheriff, et al., Hope, J. J., vs.  
Hill, S. B., Mrs., vs. Mayer, J., et al.

Hope, J. J., vs. Heffner, Sheriff, et al.  
Jumel, Auditor, State ex rel. Louisiana Levee Company vs.  
King, Joseph, Administrator, Meyer, H., Administrator, vs.  
La Fleur, Joseph, State vs.  
Mack, James, State vs.  
Mayer, H., Administrator, vs. King, J., Administrator.  
Mayer, J., et al., Hill, Mrs. S. B., vs.  
McCune, A., et al., Shreveport, City of, vs.  
McLemore, H. W., Berwin, M., vs.  
Monroe, Mayor, etc., vs. Cain, J., et al.  
Nesbit, William, Succession of.  
Payne, O. B., State vs.  
Pearce, B. F., Succession of.  
Post, J. S., et al., Ramsey, S. W., vs.  
Prater, W. G., State vs.  
Rains, M. A., vs. Collins, W. N., Sheriff, et al.  
Ramsey, S. W., vs. Post, J. S., et al.  
Robinson, Isaac, State vs.  
Shreveport, City of, vs. McClune A., et al.  
State ex rel. Forstall, E. J. & Sons vs. Board Liquidation.  
State ex rel. Louisiana Levee Company vs. Jumel, Auditor.  
State vs. Byrd, Frank, P.  
State vs. Clary, J. W.  
State vs. Hebert, Gabriel.  
State vs. La Fleur, Joseph.  
State vs. Mack, James.  
State vs. Payne, O. B.  
State vs. Prater, W. G.  
State vs. Robinson, Isaac.  
State vs. Thomas, William.  
State vs. Tumblon, Alexander.  
Succession of Evans, C. M.  
Succession of Nesbit, Wm.  
Succession of Pearce, B. F.  
Templeman, LeRoy, vs. Gilmer, T. M., et al.  
Thomas, William, State vs.  
Tumblon, Alexander, State vs.  
Whited, E., et al., Blanchin & Giraud vs.  
Williams, John S., vs. Chaffe, C.



## Succession of Clark.

No. 6837.

SUCCESSION OF JOHN CLARK. PAMELIA CLARK ET AL. APPELLANTS. MRS.  
REILLY ET AL. APPELLEES.

Where three separate questions, tending to one conclusion, arise in one and the same case, as for example in the settlement of a succession, and having been consolidated by consent of parties are passed on in three separate decrees, rendered simultaneously, these decrees may all be brought before this court in one single appeal.

In such a case one appeal bond is sufficient; and as appellants were not condemned by the lower court to pay any sum of money, or deliver any property, the bond need only be for an amount to cover costs.

Persons not parties to a suit have a right to appeal from the judgment rendered in it, if they intervene, and allege that they have been aggrieved by the judgment. And if it shall appear to this court that they have an interest in the suit, their appeal will be maintained.

No such officer as "provisional administrator," is now known to our law. If however such an officer should be appointed by the court, pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court.

Where some of the heirs of a succession are beneficiary, and their debts, and the creditors of the succession, or the heirs of age demand an administration it should be ordered.

Where there are debts of a succession, and other circumstances authorizing the demand for its administration, a partition of its property among the heirs will not be ordered until it has been duly administered.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*T. Gilmore & Sons* and *J. L. Tissot* for administratrix and appellant.  
*McGloin & Nixon* for opponents and appellees.

## ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. John Clark died on the thirteenth of February, 1877, intestate, leaving a considerable estate. Mary, wife of Reilly, and Alice, wife of Woelper, children of his first marriage: Pamela, Elizabeth, and William Edwards, children of the second marriage; and Mrs. Catherine Routh, widow of the third marriage, survived him.

On the fifteenth February, Pamela Clark, who attained her majority in June of the preceding year, Mrs. Widow Clark, and Robert Meadowcroft, maternal uncle of the children of the second marriage, two of whom were minors, applied for administration of the succession.

Mrs. Reilly and Mrs. Woelper opposed this, on the grounds that Widow Clark and Meadowcroft were not entitled in preference to them; that Pamela was young, and without sufficient experience; and that Mrs. Reilly, having equality of right with her, should be preferred on account of her age.

80	801
44	861
80	801
46	422
30	801
50	436
80	801
111	188
30	801
113	910
30	801
118	210
30	801
1124	523

## Succession of Clark.

The opposition was maintained, and judgment was rendered, on the twenty-eighth March, appointing Mrs. Reilly administratrix. A motion was made for a new trial, pending which, on the eleventh April, Meadowcroft qualified as tutor of his nephew and niece; and on the twelfth April Pamela Clark filed a petition in which she alleged that the community which had existed between her father and mother had been dissolved by the death of the latter: that she, Elizabeth, and William Edwards were the sole heirs of their mother: that the community had remained in indivision under the management and control of her father, and that she desired to have a partition of their estates. She made Mary Reilly and her husband, Alice Woelper and her husband, Meadowcroft, in his capacity as tutor of the minors, and Mrs. Widow Clark, parties; and prayed for a partition of said successions.

The motion for a new trial was overruled, and the judgment appointing Mrs. Reilly administratrix was signed on the twenty-third April. She failed to qualify; and, on the fourth May, Pamela Clark, on motion, showing that Mrs. Reilly had neither qualified nor caused an inventory to be begun, obtained an order appointing her administratrix.

On the seventh May, Mrs. Reilly and Mrs. Woelper took a rule on Pamela Clark to show cause why the order appointing her administratrix should not be revoked, on the grounds that it was *ex parte*, and not warranted by law; and that a demand for partition having been made by Pamela Clark, which could not be denied, and there being few debts, no administration was necessary; and they moved that no letters of administration be granted her until the final determination of this rule; and on the same day Mrs. Reilly and Mrs. Woelper answered the petition for a partition, and prayed for a partition of the succession of their father among his heirs.

On the nineteenth May, Meadowcroft answered for his pupils that he could make no objection to a partition of the property held in indivision, as set forth in the petition of Pamela Clark.

On the twenty-fourth May the court rendered judgment rescinding the order appointing Pamela Clark administratrix. The next day she applied to be appointed administratrix of the succession of her mother; and on the fifteenth June she prayed to be confirmed as administratrix of that succession, and provisional administratrix of the succession of her father. The court granted the order as prayed for, on her giving bond in the sum of twenty thousand dollars. She gave the bond; qualified in each of the capacities; and separate letters were issued to her as administratrix of the succession of her mother, and as provisional administratrix of the succession of her father.

Mrs. Widow Clark answered the petition for partition by plea of prematurity; and that partition can not be effected until all the debts

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Succession of Clark.

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are paid; and she prayed for the appointment of an administrator to settle the succession of her deceased husband.

Mrs. Reilly and Mrs. Woelper opposed the application of Pamela Clark to be appointed administratrix of the succession of their father on the grounds that administration was not necessary, because of the pending demand for partition. In the event that administration should be deemed necessary, they alleged and claimed that Mrs. Woelper, the eldest of the heirs, was entitled to be appointed by preference.

The litigation had thus been reduced to the issues presented as follows:

1: On the rule to vacate the appointment of Pamela Clark provisional administratrix.

2: On the opposition of Mrs. Reilly and Mrs. Woelper to the application of Pamela Clark to be appointed administratrix.

3: On the petition for a partition of the successions of Clark and his second wife, as to the right to proceed to a partition among the heirs before the debts of the succession are paid.

The minutes show that "by consent of counsel the above issues were consolidated, and the case proceeded to trial."

Three separate judgments were rendered on the same day, September 24, and signed on the same day, October 12:

1: Vacating the order appointing Pamela Clark provisional administratrix:

2: Maintaining the opposition to the application of Pamela Clark to be appointed administratrix on the ground that administration was not necessary:

3: Ordering a partition by licitation, and referring the parties to a notary to regulate the details.

Pamela Clark, Meadowcroft, in his capacity as tutor of the minor heirs, Widow Clark, Mrs. Grace Batson, and Meadowcroft individually, the three last mentioned claiming as creditors, united in a motion for a suspensive appeal from these three judgments, alleging that they were aggrieved; and the appeal was granted on their giving bond in the sum of \$500.

The appellees move to dismiss on the grounds:

1: That as there were three separate judgments, upon and in three separate matters and proceedings, each decree and judgment should have been appealed from separately.

2: That there should have been three separate bonds "to secure the rights of appellants from three separate and distinct causes of action."

3: That appellants have not made a proper and sufficient showing to authorize or justify an appeal.

## Succession of Clark.

**FIRST.** All the questions passed upon in these three judgments arose in one case, the succession of John Clark; and they all tend to one result, the settlement of the succession of John Clark, whether by an administration, or by partition among the heirs, which puts an end to the succession. Pending an application for administration there could be no partition among the heirs; and after a decree ordering a partition there could be no occasion for the appointment of an administrator, there would be nothing to administer.

There were not several cases which were consolidated; there were several questions which arose in one case, that is, in the succession of Clark; and these questions were all consolidated, by consent.

We can not conceive of any prejudice to the rights of the appellees by a single appeal in the succession of Clark, from these three judgments rendered simultaneously. The intimate connection of these questions would indicate the propriety of consolidating them, and of bringing them all before the court of original jurisdiction and before this court in one single proceeding. It seems to us the single trial of all these questions in the district court, and the single appeal including them all, consist perfectly with the interest and convenience of all the parties; and we know of no authority, no law or principle which forbids this mode of proceeding.

**SECOND.** The appellants were not condemned to pay any sum of money, nor to deliver to the appellees any thing. No matter what might be the amount of the bond, or the number of bonds given by appellants, no decree could be rendered against them on the appeal, except for costs; and the costs are as fully secured by one bond with sufficient security for a sufficient amount as by any number of bonds.

**THIRD.** The appellants have brought themselves within the requirement of the Code of Practice. The parties to a suit have the right to appeal, of course; and third persons, not parties, have this right, also, when they allege that they have been aggrieved. Article 571.

Mrs. Clark, Meadowcroft, and Mrs. Batson all claimed to be creditors of the succession, and the record shows that they are creditors. There was a contest between the heirs on the application of one of them to be appointed administratrix; and that contest promised to be protracted. The applicant was appointed provisional administratrix. The condition of the succession was such as to require the exercise of conservatory powers, to prevent loss and injury. The creditors were directly and pecuniarily interested in the maintaining of the order appointing a provisional administrator to take care of the property pending the contest for the appointment of an administrator; and in the appointment of an administrator to whom they might look for payment.



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Succession of Clark.

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The creditors were equally interested in opposing a partition, before the debts were paid. While the succession is under administration the creditors look to the administrator alone; when the property has passed out of the hands of the administrator, and has been partitioned among the heirs, it is by no means convenient to the creditors to pursue each one of them for his virile share, particularly where they may have their domiciles in different parishes, or, some of them, beyond the limits of the State.

Counsel for appellees suggest that there may be difficulty in adjusting the costs in the event that one or more of the judgments appealed from should be affirmed, and one or more of them reversed. It is not new, nor is it very difficult, for judicial tribunals to apportion costs on equitable principles; but no argument based on inconvenience would justify the dismissal of an appeal.

Without intending to express any opinion as to the correctness of any one of the judgments appealed from, we think all the appellants have shown such an interest in the questions passed upon as entitles them to appeal.

The motion to dismiss is overruled with costs.

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ON THE MERITS.

The opinion of the court was delivered by

SPENCER, J. John Clark died intestate in February, 1877, leaving, first, Mrs. Reilly and Mrs. Woelper, children of his first marriage; second, Pamela Clark, of age, and William and Elizabeth, minors, children of his second marriage; third, Mrs. Catherine Clark, his third wife and widow surviving him.

His estate was inventoried at \$77,820 28, of which \$7550 92 was cash in bank, and \$8580 the appraised value of premium bonds.

There is evidence in the record tending to show that the debts of the estate amount to \$10,047 64; but a large portion of these seem of doubtful legality. It seems to be established, if not admitted, that there are debts to the amount of near \$5000.

After Clark's death, the widow and one Meadowcroft, tutor of the minors, and Pamela, applied jointly for administration. Mrs. Reilly opposed on various grounds, and claimed the appointment herself. Her opposition was sustained, and she appointed by decree signed April 23, 1877. On April 12, 1877, Pamela Clark filed a suit for partition, making all parties in interest defendants. Default was taken on this petition, and experts appointed, who reported for a partition by licitation. The tutor of the minors answered, joining in the prayer for partition. The widow pleaded that it was premature until the estate had been administered.

## Succession of Clark.

On May 7, 1877, Mrs. Reilly and Mrs. Woelper answered, and joined in the prayer for partition. Mrs. Reilly seems to have abandoned her right to administer, and did not qualify under her appointment.

On May 4, 1877, Pamela Clark, by *ex parte* motion, and on alleging that more than ten days had elapsed since Mrs. Reilly's appointment, etc., caused herself to be appointed administratrix. Mrs. Reilly and Mrs. Woelper took rule to vacate this order, because Miss Clark had sued for partition, and because the debts were small, and an administration unnecessary, and uselessly expensive. The court rescinded the order appointing Miss Clark, who seems not to have appealed.

On May 25, 1877, Pamela again made application for letters of administration; was opposed by Mrs. Reilly and Mrs. Woelper, on the ground that the estate was large, the debts small, and administration unnecessary; that the heirs demanding partition have accepted unconditionally the succession; that the above named order rescinding her previous appointment was *res adjudicata* on the question of administration, *vel non*. That, if there was necessity for administration, Mrs. Reilly should be appointed. The court sustained this opposition, and dismissed the application. From this order one branch of the appeal before us is taken.

In the proceeding for partition there was judgment decreeing it, and from that decree appeal is taken by Pamela, Mrs. Clark, and the tutor.

Pending her application for administration, Pamela Clark obtained an *ex parte* order, without notice, appointing her provisional administratrix, on a bond of \$20,000. Mrs. Reilly and Mrs. Woelper, on motion, caused this order of appointment to be set aside, and from that decree appeal is taken, also.

1. We think the court properly revoked the appointment of Pamela Clark as "*provisional administratrix*." It is an office not now known to our law; and whilst it may be, and doubtless is true, that, in the discretion of the judge, some such appointment, for the preservation of the property of an estate, might be made, pending a contest before him, he certainly would have the right of revocation at his discretion, also. But under such an appointment the appointee would be rather a guardian or keeper than an administrator—who can not be appointed, in any form, without giving bond as required by law. When the office of "provisional administrator" was known to our law, he could only be appointed on giving bond as any other administrator. Besides, the duration of the appointment of such a guardian would necessarily be short, for the law requires speedy and summary trial of such questions as contests for administration, and does not allow the decree to be suspended by appeal.

## Succession of Clark.

2. The rule is that where some of the heirs are beneficiary, and there are debts, and the creditors or heirs of age demand an administration, it should be ordered. See *Soye vs. Price* (not yet reported); 4 L. 202; 4 R. 414; 14 A. 641; C. C. 1030, 1042; C. P. 974, 982; 2 A. 465; 3 A. 502; 29 A. 348.

As stated, there is proof in this record, and we do not understand that it is denied, that there are several thousand dollars of debts against this estate. There is in the record a petition, signed by numerous persons claiming to be creditors, demanding an administration. True, this petition was filed after the trial of the issues herein above stated, but whilst a motion for a new trial was pending, and before judgment signed. That petition is verified by oath that the parties thereto are creditors, and was, we presume, filed as basis for appeal. Some of these creditors are appellants from the judgments rendered in this case refusing an administration and ordering a partition. However much we may feel disposed to approve the decree of the judge below, we do not feel at liberty, under the facts of this case, to disregard the plain and positive texts of the Code, and the uniform adjudications of the courts. As there are creditors of the estate demanding an administration, and as there are among the heirs some minors, who can not be other than beneficiary, we think a partition, if opposed, can not be made until the estate is administered and the debts paid. The proposition of appellee's counsel, that the minors by consenting to the decree of partition had unconditionally accepted, is not tenable. Neither the minor himself, nor any one for him, can accept in that way. No act of his, or of his tutor, can render him liable as heir pure and simple.

The evidence in this record does not enable us to decide to which of the heirs the administration should be confided. We think, as the judge *a quo* did not pass upon that question, we should remand the case as to that.

It is therefore ordered and decreed that the judgment decreeing the partition be reversed and set aside. That the judgment refusing the appointment of an administrator be also reversed, and that this case be, as to that, remanded, with instructions to the judge *a quo* to proceed to the appointment of an administrator, according to law. That the judgment revoking the appointment of Pamela Clark as provisional administratrix be affirmed. That two thirds of the costs of appeal be borne by appellees, and one third by appellants; those of the court below to be borne by the succession.

Neel vs. Hibard.

No. 6737.

AURORE NEEL VS. PÉLAGIE HIBARD.

One who holds possession of real estate as an agent, can not acquire the property of such estate by prescription.

An action to annul a judgment can only be brought by one who has a real and actual interest impaired by such judgment.

It is not necessary that the bastard child, born in this State of a slave mother, should have been legally "acknowledged" by the mother, in order to enable the emancipated mother to inherit from said child.

**A**PPPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*W. E. Murphy* for plaintiff and appellee.

*Ed. Bermudez* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. In 1842, on the 7th of December defendant—then a slave—brought forth a child who—as herself—was a slave. With her consent and the permission of her mistress, that child was—on the 19th of February 1844—baptized under the name of Philippe, and as being the illegitimate son of Fillette Lafontaine, a free person. He was then baptized, for the reason—as said by his mother on the trial of this cause—that, otherwise, he would not have been free.

He grew near his mother and lived with her until he was about sixteen years of age. She sent him to school, and being remarkably intelligent, as shown by his letters, he progressed rapidly in his studies, attracted the attention of one Alexander Marionneau, who became intensely attached to him, and determined—after consulting with and obtaining the assent of his mother and of his mistress—to remove him from this State, where he was exposed to pass from the possession of a friendly owner under the control of less tolerant masters. When about to return to France, Marionneau, whose intention was—not merely to secure the freedom of Philippe—but to conceal the irregularity of his birth, the misfortune of his condition, concluded that his name and status should be changed. It was then that he and one Campanel—deceiving a priest and the Recorder of births—caused two false entries to be made, in and by which the pretended son of Fillette Lafontaine was represented as the legitimate issue of the marriage of Banks Dunbar with Anna Philippe.

This done, Marionneau—who had some property in this City—appointed as his agent and to take charge of it, one Louis Neel, the husband of plaintiff; and—in 1858—with legalized certificates of the false entries already referred to—left for France, accompanied by William Dunbar, the son of Pélagie.

That Marionneau, Campanel and defendant were guilty of a fraud,

## Neel vs. Hibard.

we do not deny; but that fraud was perpetrated with the aid and sanction of those who alone could have complained of it, and it is too late to denounce it.

Marionneau died in France, on the 13th of April 1861, and—by his last will—the inconsiderable property which he owned here passed to William Dunbar, who retained Louis Neel as his agent. He was—by that agent and by plaintiff herself—recognized as the son of Pélagic and the owner of the property which had belonged to Marionneau. Shortly after the death of the latter, Dunbar was penniless, and—as he had ever done—he worked incessantly to get a livelihood. Overtaken by sickness, he wrote the most imploring letters to obtain the revenues which—he thought—and which, in all probability, his agent had derived from the lease of his property in New Orleans; but he wrote in vain. Prostrated by an accidental consumption, he entered an hospital in Paris, and there he died on the 12th of March 1867, possessed of naught but his clothes and ten cents.

More than eight years after—on the 17th of April 1875—Pélagic Hibard was, by a decree of the second district Court, recognized as the sole heir of William Dunbar, and ordered to be put in possession of his estate. Two days after the rendition of that decree, Joseph Flores called on plaintiff, with a copy of said judgment, and demanded, in Pélagic's name, possession of the property which had been left in charge of Louis Neel—at first by Alexander Marionneau, and—at his death—by William Dunbar.

Nearly thirteen months after that demand, the widow of Louis Neel filed an action in the second district Court, in which she alleges that the decree which recognizes Pélagic as the sole heir of William Dunbar was improvidently rendered, without any evidence to sustain it and through the misrepresentations of Pélagic: that she is aggrieved by said decree, has an interest in attacking it and prays that it be rescinded and annulled.

How is she aggrieved? Pélagic is disturbing her in what she terms “the legal and peaceable possession of a lot of ground and improvements thereon.” That lot and those improvements are the same which—from 1858 to 1861—Louis Neel held in no other capacity than as agent of Marionneau, thereafter as the agent of William Dunbar, and his widow's pretension is as extravagant as unjust.

Those who possess as she does, can not acquire a legal possession, because it can not be presumed that they had the intention of possessing for themselves, and even if they did entertain that dishonest intention, their possession continues to be that of the person for whom they originally took it.

R. C. C. 943, 3441, 3446, 3489, 3490, 3432.

An action can be brought by only those who have a real and actual interest which they pursue, and plaintiff has completely failed to show how she was or can be aggrieved by the effects or the execution of the judgment which she seeks to annul.

C. P. 15.

Mrs. Neel's counsel contends that—not only Pélagie has not acknowledged William Dunbar as her son, but—on the contrary—has denied that fact from his birth. To justify that reproach, he refers to the misrepresentations resorted to, for the purpose of securing the freedom of her child and concealing his origin. Her participation in that fraud did—in no way—deprive her of any right to which she may be entitled as the mother of the deceased.

To sustain her action in nullity, plaintiff relies on articles 203, 922 and 929 of the Revised Code, which provide—the first, “that the acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it shall not have been made in the registering of the birth or baptism of such child—the others, that the estate of a natural child deceased without posterity belongs to the father and mother who have acknowledged him, and—in default of acknowledged relations—to the State.

William Dunbar died in 1867. The Code of 1825 was then in force, and not a single provision of that Code, concerning the acknowledgment of illegitimate children and their successions, can be justly invoked against those of our slaves who were emancipated after the war. At the birth of her son, Pélagie was a slave and she would not have been allowed to make such an acknowledgment. When slavery was abolished, her absolute incapacity fell, and—as all free persons, even minors, lunatics, persons of insane mind and the like, she became invested with the right of inheriting.

Code of 1825, article 945.

The deceased's mother was not married and he was a bastard. Is that any concern of plaintiff? That mother's concubinage, the illegitimacy of her son, were the almost inevitable results of their condition, and as that condition was not of their choice, but one imposed by the laws of the State, the maternity of the slave—though hatched in a not prohibited concubinage, can not be invoked as a crime against the emancipated mother, and can assuredly not authorize the widow of her son's agent to despoil the concubine, and to keep as her own the property of the bastard.

We do not hesitate to hold that a female slave, whose child was born before the general emancipation which followed the war, who has acknowledged that child in the only manner in which she could have

## Neel vs. Hibard.

done so, by nursing him, by treating him as such, and who—by him—has always been recognized as his mother, is certainly entitled to his succession to the exclusion of at least the State; unless, perhaps, the succession thus claimed would have been opened after the revision of the Code of 1825.

Were plaintiff to succeed in her attempt, what would she gain? The harsh and barren satisfaction to dispossess a mother, and for whose benefit? Not her own, but that of the State. Thus, the very authority on which the party relies, clearly demonstrates that she has—not only no real or actual interest, but not even a prospective or eventual interest in the matter, unless it be to retain—and forever—in disregard of law and justice—the property entrusted to their care, and which she and her husband have enjoyed, without the form of a title or shadow of a right, for more than ten years.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed, and plaintiff's demand rejected at her costs in both courts.

No. 6897.

30	811
48	710

MARY STUFFLER vs. ELIZA J. PUCKETT.

A parish judge has no power to authorize a married woman to contract a debt for more than \$500.

Where the wife has not been judicially authorized to give a mortgage on her separate property, a note and mortgage executed by her are not legal proof of her obligation, and evidence *aliunde* showing that it was her separate debt, must be produced, in order to bind her.

Unless the wife accepts the community expressly, or tacitly, she stands in relation to its debts as she does toward the debts of third persons.

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

*Herron, Bird & Beale* for plaintiff and appellee.

*Saml. P. Greeves* for defendant and appellant.

The opinion of the court was delivered by .

SPENCER, J. The plaintiff, owning as her paraphernal property a lot of ground in Baton Rouge, borrowed from the defendant \$2000, on April 24, 1872, and executed solidarily with her husband a promissory note therefor, to the order of Eliza J. Puckett, payable in one year. In the act it is declared that the improvements upon said lot were made after marriage, and belong to the community; and that, therefore, the husband joins in the act. The act also declares that the wife had been authorized by the parish judge; and there is annexed to it a petition of

Mrs. Stuffer, addressed to the parish judge, asking his authorization, and a very informal certificate of that functionary to the effect that "after examination of the petitioner, being satisfied that it is necessary and proper that the said sum of two thousand dollars should be procured for the purpose therein set forth," he orders that she be authorized to grant the mortgage. In her petition for authorization she sets forth that she owns the lot, but that the improvements thereon belong to the community; that the lot is encumbered with a mortgage past due, and there are other claims, not specified, which she desires to pay.

James Stuffer died in 1873, and soon after plaintiff qualified as administratrix of his estate.

Defendant sued out executory process on this mortgage in 1877, making Mrs. Stuffer individually, and as administratrix, defendant. Thereupon, Mrs. Stuffer enjoined the sale, alleging in substance that the debt was contracted during marriage and was a debt of the community, for which neither she nor her property was liable; that the interest of the community in said property was a mere money claim against her for the improvements put on it, and could only be ascertained and enforced in a settlement between herself and the community; that the pretended authorization of the parish judge was without effect for want of legal form, and because the parish judge was without jurisdiction to grant it. She further alleges that the sale was not advertised for the time required by law.

Under article 127 C. C. the application for authorization is to be made to the district or parish judge, "according to the amount involved." This refers, of course, to the constitutional amounts determining the jurisdiction of said judges. By express provision the Civil Code governs where its enactments are at variance with those of the revised statutes of 1870; sections 3982 and 3983 of the statutes must therefore be controlled by article 127 C. C. Besides, the article of the Code is more in harmony with the constitutional limitations upon the jurisdiction of said courts. It is not necessary to decide whether, upon oath of the absence of the district judge, a petition for authorization addressed to him can be granted by the parish judge, since there is no such question raised by the facts or pleadings in this case. We think the authorization in this case was invalid, and without effect, and that the case stands, therefore, upon the effects of the acts of a married woman not acting under judicial sanction.

It is unnecessary to cite authority to show that, in such case, the simple denial of the wife put the onus of proof upon the creditor; that her note and mortgage are not legal proof of her obligation, and that evidence *aliunde* must be produced to bind her.

In this case it is shown that there was, as stated by her, a pre-exist-



ing mortgage granted by her to one Payne, in 1870; but that mortgage was in all respects similar to the one in controversy, except that its amount was only \$1000, and there was no pretense of judicial authority for giving it. It is rendered probable that this pre-existing mortgage was taken up with money obtained from Mrs. Puckett on the second mortgage, but there is not only no proof that this debt to Payne was a separate debt of the wife, but, on the contrary, a presumption of law that it was a debt of the community. In fine, the defendant wholly failed to prove the plaintiff's separate liability. There is no analogy between this case and that of "*Jordan vs. Anderson*," 29 A. 749. That was a case where the wife entered into a contract with a builder to construct, with his own labor and material, a house on her paraphernal property. We held that she and her property were liable to him. Here, the wife borrows a round sum of money, and gives her note and mortgage. The very act of mortgage shows that the improvements upon her property were already there, and put there by the community.

An attempt was made to show that the wife had ratified this act of mortgage by paying interest on it after the husband's death. She was administratrix of her husband's estate, and nothing shows in what capacity she made the payments. It might well be doubted whether any thing short of a written promise to pay would render her liable, if *this was in fact* a community debt, since the law *prohibits* her, during marriage, from binding herself for such debts. It strikes such obligations with absolute nullity. "*Toute ratification est donc impossible pour une obligation proprement nulle; sans doute, on peut créer une obligation nouvelle et efficace pour la substituer a celle qui n'avait qu'une existence apparente, mais on ne peut pas plus valider celle-ci, car le néant ne peut pas plus être confirmé qu'il ne peut être détruit; quod nullum est confirmari nequit.*" *Marcadé*, vol. 5, p. 344.

Unless a wife accepts expressly or tacitly the community, she stands in relation to its debts very much in the position which she would to the debts of any other third person. A promise to pay the debt of a third person must be express, and in writing, signed by the party to be charged. C. C. 2278, number 3.

The judge *a quo* perpetuated the injunction, but gave, in effect, a judgment of nonsuit as to defendant's claim. The appellee has not asked that the judgment be amended, and appellant has no just reason for complaint, as the judgment is, perhaps, more favorable to her than it should have been.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

State vs. Curtis.

No. 6772.

## THE STATE VS. S. W. CURTIS.

When the motion for a new trial, on the ground of newly discovered evidence, does not disclose the evidence, or the source from which it is derived, the motion is defective, and should be overruled.

An information charging defendant with breaking and entering a store at night, with intent to steal, which fails to charge that defendant *feloniously* entered, and fails to charge that he did break, and enter with *burglarious*, or *felonious intent* to steal, etc., is fatally defective.

**A** PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

*H. N. Ogden*, Attorney General, for plaintiff.

*P. P. Carroll* and *J. N. Healy* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant was charged as follows :

The State of Louisiana, First Judicial District, Parish of Orleans, ss.  
Superior Criminal Court for the Parish of Orleans :

John J. Finney, District Attorney, of the First Judicial District of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in this behalf, in proper person comes into the Superior Criminal Court for the parish of Orleans, in the parish of Orleans, and gives the said court here to understand and be informed that one S. W. Curtis, late of the parish of Orleans, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-six, with force and arms, in the parish of Orleans, aforesaid, and within the jurisdiction of the Superior Criminal Court for the parish of Orleans, did in the night time, and with intent to steal, break and enter the store of M. Andrieu & Co., contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same.

JOHN J. FINNEY,

*District Attorney of the First Judicial District.*

Upon this information he was tried and convicted, and after an ineffectual motion for new trial, was sentenced to ten years hard labor in the State Penitentiary. Our attention has been called to the action of the court in annulling the motion for new trial, of which it is only necessary to say that we can not consider the question as to the sufficiency or insufficiency of the evidence to convict, were it before us, as it is not; and that the precise nature of the newly discovered evidence, or the source from which to be derived, is not disclosed in the motion, which is, therefore, defective, and need not be considered. A motion in arrest of judgment was filed in the court *a qua*, the grounds of which are assigned as error in this court. They are: "That the information does not

charge that said defendant, on the twenty-seventh day of September, 1876, did *feloniously* enter," etc. "Nor that the said defendant, on the same day and date, did then and there, *with felonious intent* to steal, break and enter the store aforesaid." "Nor that the said defendant, *with burglarious intent*, did then and there break and enter the said store." It will be seen from the information already read that it is liable to the objections taken in point of fact. We have, therefore, only to consider whether it is therefore defective in point of law. If the information were at common law it would be clearly bad, and so, also, if the statute referred to a common-law offense. See *State vs. Thomas*, 29 A. 601, and authorities there cited. It has been very properly held in this State, under the statute against breaking and entering with intent to commit a crime, that the indictment would be bad if it only charged the intent to commit a *misdemeanor*. The general rule unquestionably is that, where the offense was not one at common law, it is in general good to charge substantially in the language of the statute. That under which this information was filed reads as follows: "Whoever, *with intent* to kill, rob, steal, commit a rape, or any other crime, shall in the night time break and enter into any shop, store, courthouse, church, barn, rice or sugar house, cotton house, plantation, or any vessel, or having with such *felonious intent* entered, shall in the night time break any such house, building, or vessel, and every person present aiding, assisting, or consenting to such *burglary*, or accessory thereto before the fact, by counseling, hiring, or procuring such *burglary to be committed*, on conviction shall suffer imprisonment at hard labor, not exceeding ten years." R. S. 1870, section 852. The use of the words "*with such felonious intent*," and the words "*such burglary*," in the statute can not be without meaning, and we think necessarily refer to and characterize both clauses of the statute, and indicate the legislative intent that though the breaking and entering charged be not of a dwelling-house, it was and is intended to be classed and considered and charged as "*burglary*," under our law. The statute of 1855, which has been reproduced in substance, and almost in language, has been often held as not intended to make a radical change in the system of criminal pleadings, but to simplify it, and correct some supposed deficiencies, and not to dispense with the substantial averments of a bill of indictment at common law, of which the absence of the word "*feloniously*," or "*burglariously*," or with "*burglarious intent*," would be fatal to an indictment; so we think the absence of those essential averments in an information for what is termed and considered by our law "*burglary*," is equally bad; while the statute under which this information was filed would seem to enlarge the definition of burglary at common law so as to embrace another class of cases, neither that nor any other statute has changed "the mode of prosecution," the

substantial requisites to a good indictment or information for that crime, however defined, which are, therefore, the same as at common law; and we think, under the terms of the statute in question, that if the term "*burglary*" had been altogether omitted from it, the use of the word "*feloniously*" in the information under it is essential. See, again, *State vs. Thomas*, 29 A. Wharton's Am. Crim. Law, sections 1607, 1612, and 1613; see, also, same, section 272; 8 R. 590; 10 A. 195; same, 698; and *State vs. Stiles*, 5 A. 324.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside, and the information quashed, as not good in law, and that the defendant remain in custody subject to the orders of the Superior Criminal Court of the parish of Orleans for further prosecution, according to law.

## No. 7073.

STATE EX REL. BOARD OF SUPERVISORS, ETC., VS. BOARD OF LIQUIDATORS.

The Board of Liquidators appointed to carry into effect the provisions of the Funding Act of 1874, can not refuse to fund any legal warrants, or bonds of the State, when required to do so by the owners, or the legal custodians of such bonds.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*J. S. Brent* and *E. H. Farrar* for plaintiffs and appellees.

*H. N. Ogden*, Attorney General, for the defendants.

The opinion of the court was delivered by

MARR, J. The Relators obtained a peremptory mandamus, ordering the State Treasurer and the Secretary of State, joint depositaries of certain bonds known as the Seminary Bonds, to present them to the Board of Liquidation, to be exchanged for Consolidated Bonds, under the Funding Act of January 24, 1874.

In obedience to this order the Depositaries presented the bonds for funding, and the Board of Liquidation refused to fund them. Thereupon the Relators proceeded by mandamus against the Board, to compel the funding. The Board made no written answer; and the mandamus having been made peremptory, the Board appealed.

There is no question about the legality of these bonds. They were issued under act No. 182, of 1857, in liquidation of the indebtedness of the State to the Seminary fund; and the interest was paid on them semi-annually, until 1873. We understand the refusal of the Board to be on the ground that these Bonds represent a trust fund; and that it would be bad faith on the part of the State to diminish them by forty per cent.

The funding act authorizes the funding of all valid outstanding bonds of the State, and valid warrants, etc., drawn previous to the passage of the Act; and if the owners, beneficiaries of the bonds, or those having the legal custody and control of them, choose to avail themselves of the privileges of the Act, the Board of Liquidation has no right or authority to discriminate between one valid bond and another, as to the merit of the original consideration. Such distinctions might influence the future action of the State.

We can not, in this proceeding, review the judgment requiring the Depositaries to present these Bonds for funding; nor can we deny to the Relators the privileges to which they are entitled under the funding Act.

The judgment appealed from is, therefore, affirmed with costs.

No. 7029.

STATE VS. ISRAEL MORRISON.

30	817
45	56
80	817
104	259

No indictment is valid which does not contain an indorsement of the special crime charged, followed by the words "a true bill," and signed by the foreman of the grand jury in his official capacity, in the presence of the grand jury.

**A** PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Yoist, J.*

*H. N. Ogden, Attorney General, for plaintiff.*

*Hewes & Parlange for defendant.*

The opinion of the court was delivered by

**MARR, J.** Appellant, the accused, was tried and convicted on a charge of murder; and, after ineffectual motions, first for new trial, and then in arrest of judgment, he was sentenced to death.

The paper called an indictment states that the accused did \* \* \* kill and murder one Robert Noland; and the indorsement on this paper is: "No. 266, State vs. Israel Morrison, 'Murder.' Oscar Joffrion, Foreman; L. H. Ducoté, District Attorney."

The minutes show that Joffrion was appointed Foreman; that the Grand Jurors were sworn; and that, after having received the charge of the Judge, they retired to enter upon the discharge of their duties; but there is no entry to show that they ever again made their appearance in court.

It was admitted on the trial of the motion in arrest that the only indorsement on the indictment is that copied above; "and that the words 'a true bill' or words equivalent thereto do not appear in any part of the indictment."

It would be a waste of time to consider any of the other objections

raised by the motion in arrest and the bills of exception. For all that appears, this indictment may have been the work of the District Attorney and the Foreman alone, without ever having been submitted to or acted upon by the Grand Jury. The finding of the Grand Jury is expressed in one way alone; and that is by the indorsement of the crime, for instance, "Murder," followed by the words "a true bill," signed by the Foreman, in his official capacity, in the presence of the Grand Jury, in attestation of their official action; and no other evidence can be received to show that they have acted upon the charge and found the bill, than that afforded by the indorsement of the crime, and the finding, "a true bill," verified by the signature of the Foreman.

When a bill has thus been found, it is the business and the duty of the Grand Jury to go into court and through their Foreman, in open court, to present the bill, which is done, usually, by handing it to the Judge. It is the business of the Clerk, when the bill is delivered to him by the Judge, to state in his minutes the coming of the Grand Jury into court, and presenting the bill in open court, and to record the finding as it is indorsed on the bill, with the signature of the Foreman.

Israel Morrison has not been legally charged with the crime of murder; and the verdict and sentence are mere nullities.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside; that the judgment and sentence of the court be annulled, avoided, and reversed; and that Israel Morrison be detained in custody, to await the further action of the District Attorney and the Grand Jury of the parish of Pointe Coupée, and until discharged in due course of law.

#### No. 7021.

#### MARCELLITE MARTINEZ ET AL. VS. SUCCESSION OF ADOLPHE VIVES.

Service of citation, and a certified copy of the petition in a suit, before the proper court to revive a judgment, made on the administrator of the judgment debtor within ten years of the date of the judgment, will interrupt prescription, even though the number of days within which the defendant was called on to answer was not specifically set forth in the citation.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville.  
*McVea, J.*

*E. B. Talbot* for plaintiff and appellant.

*Barrow & Pope* for defendant and appellee.

The opinion of the court was delivered by

**EGAN, J.** This suit is to revive a judgment rendered by the district court of Iberville on the eleventh of May, 1866. It was filed on the

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Martinez vs. Succession of Vives.

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ninth of May, 1876, and citation and copy of petition served personally upon the administrator of the deceased judgment debtor on the next day, the tenth of May, 1876, within less than ten years from the date of the original judgment.

On motion of the defendant's counsel a default taken upon this service was set aside on the ground that the citation did not, as required by the Code of Practice, specify the number of days within which the defendant was called on to appear and comply with the demand or file his answer. Thereupon a new citation was issued and regularly served, though meanwhile more than ten years had elapsed from the rendition of the judgment sought to be revived.

The defendant pleaded the prescription of ten years and other matters of defense not necessary to be considered, as this appeal is from a judgment dismissing the suit on the exception of prescription only.

We have been invited by counsel on both sides to consider the effect of the act of 1858 "to require written proof in certain cases" in connection with that of 1853 providing for the first time a prescription for judgments. Both are now embodied in the late revision of the Civil Code. We do not, however, consider it necessary to embark in that field of inquiry in the present case, to which we do not consider the former act as having any application. The sole question here is whether or not the citation issued on the ninth of May, 1876, and served together with a copy of the petition setting forth the nature and character of the demand upon the administrator personally on the tenth of the same month, interrupted prescription. There is no pretense that the representative of the succession was not fully informed by that service of the nature of the demand and cause of action; none that the copy of petition served was not a true copy, or that it was not properly certified as such, but only that the number of days within which he was called upon to answer was not specifically set forth in the citation.

It must be remembered that this citation was issued in the present suit, and that there is here no question of the effect of citation in another and different suit or proceeding to interrupt the prescription pleaded.

Neither can it be now contended in the face of the frequent adjudications of this court to the contrary that citation issued and served within ten years from the date of the original judgment does not stop prescription even though the judgment of revival be not rendered till after the lapse of ten years. This is but the recognition and application to suits for the revival of judgments of the principle of legal interruption of prescription operated by citing the defendant before a court of justice, whether it be a court of competent jurisdiction or not, recognized in articles 3516 (formerly 3482) and 3518 (formerly 3484) of the Civil Code. Indeed, that mode of interruption is specially provided by the

very terms of the law which provides for the prescription of judgments. See R. C. C. article 3547.

The only inquiry remaining then is whether the service of the copy of the petition in this case upon the administrator personally, not constructively, together with a citation defective only in not stating the number of days within which he was called on to answer operated such legal interruption of prescription in the present case. The copy of petition served informed the administrator fully of the nature of the suit; even the citation itself gave not only the title of the cause and of the court but also the names of the parties and nature of the action, and was properly addressed to the defendant in his capacity of administrator of the succession of Adolphe Vives, the deceased judgment debtor. Indeed, it was in all respects regular except as to the time for answering the demand, and the service seems to have been so far effective that the defendant appeared by counsel in time to prevent the ripening into final judgment of the default taken upon that service.

The reasons given by the district judge for setting aside the default are solely the defect as to time for answering in the original citation.

In the case of Pratt vs. Peets, curator, 3 La. 281, where prescription was pleaded against a revocatory action after the dismissal of an intervention by the same plaintiff in another suit in which he set up the same fraud relied upon in that case, Judge Matthews, as the organ of the court, said: "A mistake in the tribunal it seems will not destroy the effect of a suit in the interruption of prescription; and by analogy it ought not when the error occurs in the manner of prosecuting such suit in consequence of which it is dismissed." And the court overruled the plea of prescription.

In White vs. McQuillan, 12 L. 533, prescription was pleaded against promissory notes and it was urged that a previous imperfect service of citation did not interrupt prescription. There the service as in this case was personal, and the defect was that the copy of petition was not certified by the clerk under seal of his office. Judge Bullard, as the organ of the court said: "We are of opinion that the service of the citation together with a copy of the petition, although it may not appear that the copy was duly certified by the clerk, is a sufficient judicial demand to interrupt prescription." In Flower et al. vs. O'Connor, prescription was pleaded against a promissory note payable and belonging to a commercial firm dissolved by death of one of the partners. Suit had been previously brought before prescription had run upon the same note by the surviving partner as such, but without authority to represent the heirs or representatives of the deceased partner, and was for that reason dismissed as of nonsuit. It was claimed that prescription was thereby interrupted, and the court said: "It is a well-settled doctrine in our



jurisprudence that one of the modes of interrupting prescription is by citing the possessor or debtor before a court of justice; that it matters not whether the suit is brought before a court of competent jurisdiction or not; that prescription is interrupted by suit, although the plaintiff therein be nonsuited; that a mistake ought not to destroy the effect of such suit when the error occurs in the manner of prosecuting it in consequence of which it may be dismissed;" and cites a number of authorities in support of the views expressed. The court then proceeds to review the whole question, and, after an apt quotation from Pothier, says: "It is clear from this doctrine of Pothier that in order to determine the effect and extent of a legal interruption we must inquire more particularly into the object and cause of the action than into the right of the plaintiff, the manner in which it is prosecuted, and the competency of the court in which it is instituted, and endeavor to ascertain how far the knowledge of the titles on which it is founded has been brought home to the defendant by the judicial demand; and we do not hesitate to conclude that if it be established that the defendant has been judicially notified of the titles which are the foundation of the demand for the whole property or of the debt so as to acquire a sufficient knowledge of the rights which are sought to be enforced against him by suit, there results from said suit a legal interruption in favor of those to whom such rights may belong; and such the court says seems also to be the true spirit of our own law, citing C. C. 3484, now 3518, to the effect that "a legal interruption takes place when the possessor has been cited to appear before a court of justice on account either of the ownership or of the possession; and the prescription is interrupted by such demand whether the suit has been brought before a court of competent jurisdiction or not."

In the case of *Driggs vs. Morgan*, 10 R. 120, there were two citations, one of which, issued and served before prescription had run, was excepted to as insufficient, whereupon the plaintiff, as in this case, caused a new citation to issue, and the defendant pleaded prescription to the action which was to recover damages *ex delicto*. The court below overruled the plea and the Supreme Court affirmed the ruling, and in so doing said the defendant could not have been mistaken as to the court before which he was called on to answer; that the citation was headed and issued from the district court of the Fourth Judicial District for the parish of Pointe Coupée, where the suit was stated to be pending, and was signed by the clerk with the attestation of the name of the judge of that court. The exception was that the citation required the defendant to file his answer "in the office of the clerk of the court of the parish aforesaid at the court-house, at Pointe Coupée."

This suit was prior to the constitution of 1845, and parish courts

were still in existence; there was therefore more substantial ground of error or objection than in the present case, although it is proper to add that the court thought the original citation good.

In *Barrow vs. Shields*, 13 An. 58, Judge Buchanan, as the organ of the court, said: "It is immaterial for the purpose of interruption of prescription whether the debtor be cited before a court of competent jurisdiction or not. Neither does any error in the form of the action nor the rejection of the creditor's demand by the final judgment thereupon have the effect of avoiding the interruption of prescription resulting from citation; for these clauses of the 2247th article of the Code Napoleon which declare that the interruption of prescription is considered as "*non avenue*" if the suit be informal or if the demand be rejected, have not been copied into our Code. The only portion of that article adopted by our legislature is the clause "*Si le demandeur se désiste de sa demande*," citing C. C. 3485, now 3519. In the same case Judge Merrick says, citation *eo nomine* is not essential to interrupt prescription; that a subpoena in chancery is equivalent to citation, citing 15 La. 485; so, also, where citation is waived, C. P. 177; that a reconventional demand has like effect, citing *Morgan vs. Briggs*, before quoted. 10 R. 119. Judge Spofford in the same case, p. 70, says: "It would seem that the interruption takes place whenever the debtor is brought into court, no matter how irregularly or improperly, to answer on account of the debt in a suit to which the creditor is a party," and further "under a similar textual provision it has been held in France that the appearance of a warrantor in a cause, cited only at the instance of the defendant, if he sets up a defense to the plaintiff's demand, will interrupt the prescription pleadable by the warrantor against the plaintiff," and cites *Dalloz*, 32, 1, 164. In *Morton vs. Valentine*, 15 A. 150, the plaintiff recovered a judgment in Mississippi, where there was a statute providing that judgments shall not be revived by *scire facias*, nor shall any action of debt be instituted thereon after the expiration of seven years from the date of that judgment. The defendant removed to Louisiana and was sued upon the judgment which was revived by *scire facias* in Mississippi, after it had become barred by the statute. He pleaded the prescription of seven years under the Mississippi statute, and his plea was overruled. We only allude to this with the other cases to show the tendency of our jurisprudence. But we now come to other decisions more directly apposite to the case at bar. In *Smith vs. Taylor*, 10 R. 133, Bullard, judge, as organ of the court, held that where the petition was deposited in the clerk's office by the plaintiff's attorney before the time necessary to prescribe the action had elapsed, but in consequence of the absence of the clerk and deputy clerk from the parish it could not be filed nor citation issued until the time had elapsed, the action will

not be prescribed. "The court said the plaintiff had until the last day of the year to commence proceedings, and was not obliged to procure process before. If at that time there was an impossibility to procure the necessary process the prescription was suspended." Citing 7 N. S. 471, 3 La. 221. In *N. O. Canal and Banking Company vs. Tanner*, 26 An. 273, our immediate predecessors held that prescription was interrupted by a citation issued by a person *de facto* in possession of the clerk's office in 1873, although he was so under authority of a government they did not recognize.

In *Leon vs. Bouillet*, 21 An. 651, it was held that citation served upon one whose native language is French when the petition is written only in English will interrupt prescription, and yet the law was at that time, 1865, even more positive on this subject, and the reasons for requiring service in the native tongue of the defendant much stronger than those which require the number of days for answer to be stated in the citation. No one will question that exception to the service made in the case just quoted should have been sustained *in limine*, and new service ordered, and such was the ruling of the court, but it also said that though the words "must be" were used in the article of the Code of Practice, 172, it was no more than was done in relation to all the other forms of a petition, such as names, surnames, etc. But the Code does not pronounce the absolute nullity of a petition defective in these particulars. It held the nullity only a relative one, and that while the defendant had a right to require service in his native tongue it did not follow that the suit must be dismissed, and cited 7 La. 413, *Thomas vs. Baillio*, where the precise point was ruled in the same way. In the last-named case the court cited as analogous the case of *Lowery vs. Kline*, 6 La. 380, where the exception was that the petition did not set forth the residence of the plaintiff. In the 21 An. case the court held that the exception was one required to be made *in limine litis*, and say: "We must conclude therefore that the defendants had been cited to appear before a court of justice, and that prescription was thus interrupted," citing the cases of *White vs. McQuillan* and *Flower vs. O'Connor* already reviewed in this opinion, and also 4 La. 418, and 4 R. 258, of which we will only remark that they sustain the ruling in question. If, however, we were to consider alone the authority of *Smith vs. Taylor*, 10 R., where the petition was merely deposited in the clerk's office the day before prescription was complete, and the later case of *Canal Bank vs. Tanner*, 26 An., is it not manifest that the plaintiffs have brought themselves within the rule in both cases, and that they had done more than was done in 4 R. and 21 An. cases, by procuring the service upon the defendant of a citation and copy of petition from which he could not fail to understand the nature and object of the demand? The plaintiffs

were not responsible or in fault for the omission of the clerk, whose duty it was to state the number of days in the citation. So far from abandoning, or discontinuing, or not making their demand, they were pressing it by all means in their power; and we think that the administrator, the representative of the succession, "had been cited to appear before a court of justice" to answer the demand, and that the objection to the citation was of such character that it should have been made before the default, which the court erred in setting aside. That, however, is unimportant, as we are only now concerned with the first service and citation as affecting the question of prescription, which we think was interrupted by it.

It is therefore ordered, adjudged, and decreed that the judgment of the court below sustaining the defendant's plea of prescription be and it is avoided and reversed; and it is now ordered and adjudged that the plea of prescription be and it is overruled, and the case remanded to be proceeded with according to law, the defendant and appellee paying costs of appeal.

No. 6809.

WM. REED MILLS vs. J. Q. A. FELLOWS.

A resident of the Sixth Municipal District of the city of New Orleans sued in one of the district courts for the parish of Orleans, and served with citation prior to the seventh of November, 1876, remains, as to that suit, subject to the jurisdiction of said court.

After a case has been fixed for trial the court is without authority to order it to be tried by jury.

Under our practice nothing prevents the cumulation of demands for the double purpose of proving the existence of a partnership, when the defendant has denied it, and for its liquidation, when proved.

To entitle a party to the continuance of a case, on the ground of absent witnesses, it is necessary not merely to allege but to prove, that he had been diligent, that he was surprised, that he could not prove the facts by other available witnesses, and that they were not absent by his consent or procurement.

When the court orders the defendant to produce in court certain books, which plaintiff swears will prove certain facts, and defendant files, in response to the order, an evasive answer, and fails to produce the books, on the day fixed in the order (no matter whether the case came up for trial that day or not) the court will be authorized to order that the *specific* facts (but only the specific facts) sworn to by the plaintiff, be taken as confessed by the defendant.

When one partner sues the other for a liquidation and balance due on partnership account, the defendant can not set up in reconvention, damages to the business of the partnership caused by the bad habits of the plaintiff.

In the absence of express agreement a charge by one member of an ordinary partnership against the other, for keeping *the books of the firm* is inadmissible.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Gus. A. Breaux* for plaintiff and appellee.

*J. N. Hagins* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This suit is for settlement of an alleged law partnership between plaintiff and defendant, carried on under the firm name of Fellows & Mills.

The suit is brought in Fifth District Court of Orleans.

I. Defendant excepted to the jurisdiction for the reason that he is, and has been for many years, a resident of the Sixth Municipal District of New Orleans; and that, by act number forty-five of 1876, said municipal district from and after November 7, 1876, became part of the Second Judicial District of the State. See *Lafayette Insurance Company vs. Remmers*, 29 A. p. 419, and *State vs. Williams, idem*, p. 779.

This suit was instituted in Fifth District Court of Orleans, May 24, 1876, at which time there can be no doubt that court had jurisdiction. See same cases.

The exception to jurisdiction was filed June 8, 1876, and overruled June 28, 1876. On July 1, 1876, the defendant, reserving the benefit of his said exception, filed an answer to the merits.

In the cases above cited we held that the act, number forty-five of 1876, was inoperative until the date of election of judges, on November 7, 1876, and that the Sixth Municipal District was up to that date within the jurisdiction of the courts of Orleans, but afterward under that of the Second Judicial District Court.

In the act forty-five above referred to, no provision is made for transferring any pending causes from the courts of Orleans to the Second Judicial District Court. But the defendant insists that on the seventh November, 1876, the Fifth District Court was by said act divested of jurisdiction over him, since he was a resident of the Sixth Municipal District; and that, therefore, the case should have been transferred or dismissed. The answer to this proposition is that there was no provision of law authorizing the transfer; that the record of the suit belonged to the Fifth District Court, and could not be taken from the custody of its officers, without such authority. The suit, as we have seen, was rightly brought in the Fifth District Court, where it had been put at issue before the act in question took effect. It would be carrying a technicality very far to dismiss the suit under the circumstances of this case. We have seen it could not be transferred; and, as the court had rightful jurisdiction at its inception, we hold that that jurisdiction continues to final judgment, in the absence of express law to the contrary.

II. After this cause was fixed for trial, and, not being reached, was

under the rules continued by preference to another day for trial, defendant filed a prayer for jury, which was allowed. Plaintiff moved to vacate this order allowing the jury, and the court so ordered, considering that it had been improvidently granted, after the case was fixed for trial. The court did not err. C. P. 494.

III. Plaintiff, having filed a supplemental petition reiterating in substance his previous allegations of the existence of the partnership, and charging that defendant was making way with partnership assets, obtained a sequestration.

Defendant excepted, "that until the issue of partnership or no partnership, which is raised in his answer, shall be finally heard and determined, there can be no examination into the accounts and affairs of the alleged partnership." This exception was properly overruled. Under our practice nothing prevents the cumulation of demands for the double purpose of establishing the existence of a partnership, if denied, and for its liquidation when established.

IV. Whilst the case was being tried, the defendant made affidavit for a continuance, on account of the unexpected absence of three witnesses, J. H. Oglesby, J. S. Whitaker, and E. W. Burbank; setting forth what he expected to prove by them; alleging diligence, and, also, ignorance of their departure from the city.

The court refused the continuance, on the grounds that the affidavit was insufficient, and that two of the witnesses, Oglesby and Burbank, had never been served with subpoenas. That three of them stated defendant had told them they would not be needed, etc. We think that the court properly refused to continue. The case had been on trial for some days. Under such circumstances the defendant should have brought himself within the strictest rules. He should have not only alleged but shown diligence and surprise; that he could not prove the facts by other available witnesses; that they were not absent by his consent or procurement, etc.

V. Plaintiff obtained an order requiring the defendant to produce in court, on the day fixed for trial, the docket-book and the account-books of the business of Fellows & Mills, swearing that he expected to establish by them "the existence of the partnership, and the entire allegations of the petition."

The defendant filed a sworn answer to this rule to produce, in which he refers to and adopts the allegations of his original and supplemental answers in the case; reiterating that he denies that there is an unsettled partnership between him and plaintiff; that the books are his private property, etc.

The court, considering this answer as manifestly evasive, on motion of the plaintiff, ordered that the facts stated in the affidavit of plaintiff

be taken as confessed by the defendant. Of this the defendant complains :

First, because he contends that his answer was sufficient, and denied the existence of the books called for. We do not agree with him. We have gone carefully over his answer and supplemental answer, which he adopts. They are not sufficiently direct and responsive.

Second, because the order *pro confesso* was prematurely taken. This ground rests upon the fact that the Code of Practice, article 473, provides that the books shall be "produced on the day fixed for trial." That, although this order was taken on the day fixed for trial, the case was not, in fact, tried on that day, because not reached, and, therefore, continued, with preference, to another day.

We think the order was not prematurely taken, being taken on the day fixed for trial. Besides, it comes with bad grace from the defendant to complain of prematurity when he had positively refused to produce the books, even under the coercion of imprisonment for contempt.

Third, because plaintiff's allegation of facts to be proved by the books was too vague to be entered up as proving any thing. If plaintiff alleged no facts with sufficient certainty to serve as proof, then the order could do defendant no harm. But we think there was one fact alleged with sufficient certainty, at least, to wit: that said books would prove the existence of the alleged partnership. We agree with defendant that the other averment that they would prove "the entire allegations of the petition," is too general. By article 140, C. P., the party in such case must "declare in writing, and on oath, what are the facts he intends to establish by such books," etc. In analogous cases, such as are provided for in articles 466, 561 of C. P., the courts uniformly hold that the affidavit must be specific as to the facts. This swearing by reference to voluminous records, and, as it were, by wholesale, is inadmissible; and this objection is quite as forcible against defendant's answer to the rule, as to plaintiff's affidavit for it.

We hold, therefore, that the fact of the existence of the partnership was confessed by the defendant.

Having thus reviewed the preliminary questions raised by defendant, necessarily with brevity, for he has argued at great length in support of them, and their number precludes more extended discussion without transcending reasonable limits, we come to the merits of the controversy.

The defendant in his answer charges that the plaintiff, by debauchery and dissipation injured the business and reputation of the firm, and claims \$30,000 damages therefor. The judge *a quo* properly disallowed proof of such a charge. It was foreign to the purposes and objects of the suit. The judge well says that such conduct by plaintiff would have

been excellent reason why defendant should have dissolved the partnership sooner; but, by his own showing, he not only did not do so, but continued it without remonstrance, hardly, for years, with full knowledge of all the facts. Indeed, he never seems to have thought of dissolution until long after his partner had reclaimed himself from his alleged bad habits. We prefer, for the good name of both parties that the veil of oblivion be drawn over such disclosures—especially as the plaintiff is the brother of the defendant's wife, and himself now the head of a family.

It would be impracticable within the limits of this opinion to review all the facts relating to each item in contest in this case. The partnership did a large business for more than ten years, and the items disputed are numerous, and many of them hotly contested. We have examined with care all the evidence in the cause, and have endeavored to weigh it dispassionately. The judge *a quo* gave plaintiff judgment against defendant for \$8000 65, with lien on the assets of the partnership. We have not been able to agree entirely with him in regard to several items in the account. We will state briefly our conclusions :

The balance due plaintiff per statement "A," is not disputed,	
and is .....	\$3,047 46
It appears that defendant collected from January 1 to	
July 27, 1875, date of dissolution.....	\$7,082 42
The court below allowed deductions from this sum,	
as follows: Amounts from Reynolds, Dubuclet,	
Southern Express, Swazey & Strauss, aggregating	
\$1000. To this we think should be added expenses	
of trip to Monroe, on business, \$60, making..	1,060 00
Leaving for division .....	\$6,022 42
One half of this to credit of plaintiff is.....	3,011 21
To this add half fees from Edwards and Clark vs.	
Puig, \$85.....	42 50
The amount of the Gaines judgment in favor Fellows	
& Mills was.....	29,552 00
From this should be deducted 71 cents on the \$100	
ordered by the circuit judge .....	209 82
Also, amount paid W. E. Todd.....	1,206 52
Also, allowance to defendant on account of expenses	
Emmott seizure.....	2,000 00
And its share of interest .....	395 91
Also, two and one half per cent included in the judgment	
vs. Gaines, for account of defendant as her	
bondsman in certain cases. and interest \$2186 27,	
\$5998 52. Net balance of Gaines's judgment....	23,553 48
Of which one half to credit of plaintiff is .....	11,776 74
Making plaintiff's total credit .....	\$17,877 91



## Mills vs. Fellows.

The court below credited plaintiff with one half of the fees in certain suits known as the Morgan tax suits. The evidence satisfies us that these suits were begun and settled after the dissolution of Fellows & Mills, and are distinct and different from certain similar suits in which plaintiff was concerned as counsel. We, therefore, leave this matter entirely out of the account.

We find, as above, plaintiff's credit to be ..... \$17,877 91

From this must be deducted the following debits, to wit:

His orders on account Gaines judgment .....	\$10,308 00
Amount due for board .....	500 00
Amount for furniture .....	175 00
Amount for office expenses .....	199 03
Amount for office rent to October 1, 1875 .....	127 50
Amount for office rent to December 31, 1875....	127 50
Half amounts collected, as per December 10.....	269 56
Half amount fee of Burbank .....	50 00
Half amount fee of Burbank .....	50 00
Half amount fee in Semmes case .....	100 00
Half amount fee received by plaintiff from sheriff in Morgan tax case .....	153 00
Half amount expenses to Washington in Morgan tax case .....	100 00
Half amount fee from Ivens .....	15 00
Half amount from Swan .....	105 00
Half amount balance due by Burbank .....	238 29
Half amount balance due by Beebe .....	111 87

Total debits ..... \$12,629 76    \$12,629 76

Which, deducted from credits, leaves as balance due plaintiff \$ 5248 15

The other amounts claimed by defendant as chargeable to plaintiff are, we think, unsupported. We think the claim of defendant against plaintiff for \$3000 for keeping the books of the concern is wholly inadmissible in the absence of an express agreement. The partnership is by law, and in the absence of agreement, presumed to be equal. C. C.

We have charged the Gaines judgment in favor of defendant with the amount allowed therein for becoming surety on her bonds. This liability of defendant was personal to himself, and the compensation therefor was not an asset of the partnership.

The defendant complains that the judgment allows interest against him on its amount from judicial demand; whereas, the Gaines judgment or order was not collected till May, 1877, and constitutes a large cash item in the account. We have credited plaintiff with \$11,776 74 on account of this Gaines debt, and debited him with \$10,308. The differ-

ence, \$1468 74, alone enters into the balance we declare due plaintiff. This amount of the judgment we render will, therefore, bear interest only from May 15, 1877; the balance of the judgment will bear it from judicial demand.

The credit claimed by defendant for half of uncollectible advances and balances, as chargeable to profit and loss account, is inadmissible, since defendant has not been charged, in plaintiff's favor, with such worthless assets, and can not, therefore, claim credit for them.

The judgment appealed from must, as to its amount, and as to the interest, be amended, and, in other respects, be affirmed.

It is therefore ordered, adjudged, and decreed that the judgment in plaintiff's favor be amended, so that the amount thereof be reduced from \$8000 65 to \$5248 15 ; whereof \$1468 74 shall bear interest at five per cent from May 15, 1877, and the balance at same rate from judicial demand, to wit: May 29, 1876. That in other respects the judgment appealed from be affirmed; plaintiff and appellee to pay costs of this appeal.

The rehearing asked in this case by defendant is granted.

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ON REHEARING.

The balance of the Gaines fund, on which we allow plaintiff interest, is, it seems, in custody of the United States Circuit Court, and is not under control of defendant. The allowance of interest against defendant on the sum of \$1468 74, the balance of the Gaines fund, from May 15, 1877, is, therefore, we think, an error.

It also seems that we did not give defendant credit for \$125, salary from park commissioners for August, 1875, which was included in the \$7082 42, and which was to be deducted therefrom by consent of parties. It also appears that the item \$211 25 from tax resisters, was received by way of re-imbursing to defendant expenses incurred by him, and not as fees.

These two sums amount to \$336 25; which being deducted from the \$6022 42 fixed as "amount for division," leaves \$5686 17; making plaintiff's "one half" thereof \$2843 09, instead of \$3011 21; making plaintiff's total credits (instead of \$17,877 91) \$17,709 79; deduct total debits of plaintiff, \$12,629 76; leaving balance due plaintiff, \$5080 03.

It is therefore ordered, adjudged, and decreed that our former decree herein be amended, so as to reduce the amount thereof from \$5248 15 to \$5080 03; and that the sum of \$1468 74 thereof bear no interest, instead of bearing interest from May 15, 1877; that in other respects our said decree remain undisturbed.

No. 7032.

30	831
116	406

## THE STATE VS. ELBERT FAULK.

Where a party is tried for perjury, for having sworn in a civil suit that he witnessed the sale of certain property, he has the right to introduce in evidence the judgment of the court in said suit decreeing that said sale had been made, and the reasons for said judgment given by the court.

He has also the right to show by witnesses that said sale took place on a different day from the one he had sworn to, even though the effect of such evidence is to contradict and discredit another witness in the case without having laid the basis for such contradiction.

In criminal cases it is not necessary that there should be any foreman of the jury. Nor is it necessary that the verdict of a jury should be written, or signed. It is sufficient that a member of the jury utters the verdict orally. Nor is it necessary that the verdict should express the name of the prisoner, or the specific crime for which he is condemned.

**A** PPEAL from the Eleventh Judicial District Court, parish of Union.  
*Graham, J.*

*Allen Barksdale*, district attorney, for plaintiff and appellee.

*L. B. Watkins* for defendant.

The opinion of the court was delivered by

MANNING, C. J. One Henderson went to Texas in 1874 working a mule in his waggon. His creditor, Post, pursued him, and in a settlement between them, Post got the mule and brought it back. Henderson's father thereupon brought suit against Post for the mule, alleging that he had only loaned the mule to his son. On the trial in the parish court, Faulk, the prisoner, swore that he had seen the elder Henderson sell his son a mule in the former's lot. Henderson had judgment in the parish court, and Post appealed. On the trial in the district court, the prisoner was not a witness. Post had judgment there. But in the interim between the two trials of the civil cause, the prisoner was indicted for perjury, and from the verdict of conviction, and sentence to five years' confinement in the penitentiary, he prosecutes this appeal.

A new trial was moved for the reason that "the verdict of the jury is contrary to the law and the evidence, and in conflict with justice, humanity, and common sense."

The issue was, did the prisoner swear falsely when saying that he saw Henderson sell the mule to his son. The judgment of the District court, decreeing title in Post under the younger Henderson's sale to him was offered in evidence by the prisoner, and rejected by the Court because it was "between third parties, and was not *res judicata* as to the State, and not relevant to the issue in this cause."

It is difficult to perceive what the principle, founded on the thing adjudged, has to do with this proceeding, or in what way it affects it. The prisoner was indicted for false swearing in a certain civil suit. He

offered the judgment in that suit to prove a fact, viz that the court had solemnly adjudged that a sale had been made by certain persons of a certain animal. It was for swearing that he saw that sale made, that he was indicted. It may be that a sale had been made, and the prisoner did not see it, but that is outside of the question of the right of the prisoner to prove the judgment of the Court upon the identical issue to which he swore, and in accordance with the tenor of his oath. The evidence was not only relevant, but of the greatest consequence to the prisoner. The record of the court at which the perjury is charged to have been committed is not only admissible, but is so necessary a part of the testimony that it will not be excluded for a misrecital in a mere matter of date. Thus, if the day of holding the court at which the perjury is alleged to have been committed is misrecited in the indictment, the record of that Court of a different day was not excluded, the day having been laid in the indictment with a *videlicet*. State v. Clark, 2 Tyler 282.

There was also offered in evidence, and refused, the written reasons of the judge for the judgment in that case. That paper is as much a part of the suit as any other, and we know of no good reason why it should have been excluded.

The prisoner offered one Goyne as a witness to prove that the elder Henderson did sell the mule to his son at Farrar's gin-house the day before the prisoner swore the mule was sold, but on objection by the State, the court excluded the testimony on the ground that it was "an attempt to contradict the witness Henderson by shewing that he had made different declarations as to the sale from those sworn to by him without laying the proper basis for such contradiction."

The evidence was admissible for the purpose for which the bill recites it was offered, i. e. to prove that Henderson did sell the mule to his son, and thus to assist in establishing a fact, for swearing to which as a fact, the prisoner was charged with perjury. It did not matter if it did discredit another witness. The act to be proved by Goyne was the act which the prisoner swore he saw done.

Error is assigned in that the verdict is bad because not signed by any member of the jury, and is imperfect because reading simply—we the jury find the accused guilty—without mentioning his name, or of what crime.

There is no error in this. No foreman is appointed by the court to the petit jury in a criminal trial, nor need a jury designate one by name. The jury speaks through one of its members in delivering the verdict *ore tenus*, and it does not matter whether he be called, or whether the jury call him, a foreman or not. There is no need that the verdict should be written, and hence none that it be signed. In some parts of

## State vs. Faulk.

this State, the verdicts in criminal cases are written, more perhaps because jurors have seen it done in civil causes, and supposed it proper or necessary to be done in criminal trials, but the practice in the country from which we derive our criminal procedure, and the practice in our sister States, is that the verdicts in criminal causes are always delivered *ore tenus*, and are recorded by the clerk, and then read to the jury as recorded, who are then asked if that is their verdict, and if the answer is yea, the finding, rendering, and recording is complete.

It is not necessary to notice other errors assigned. Sufficient has been said to entitle the prisoner to a new trial. Therefore

It is ordered and decreed that the verdict of the jury is set aside, and the judgment rendered thereon is avoided and reversed, and it is further ordered that the cause is remanded for a new trial of the prisoner to be proceeded with according to law.

Nos. 6948 and 6949.

30	833
48	815

STATE EX REL. CORA A. SLOCOMB VS. W. F. ROGILLIO ET AL. AND CORA A. SLOCOMB VS. JNO. J. BARROW, SHERIFF, ET AL.

In a mandamus proceeding by a mortgage creditor to compel the recorder of mortgages to record his mortgage, so as to operate as a lien on his debtor's property from a certain date, evidence is admissible to show the existence of other mortgage and judgment creditors of his debtor claiming rival liens on said property. The mortgage and vendor's privilege reserved by a vendor of real estate, to secure the credit installments due by the vendee on the purchase price, becomes operative and takes rank, as to third persons, not from the moment the act of sale and mortgage is deposited with the recorder of mortgages for registry, but only from the moment it is actually inscribed in the *Book of Mortgages*, kept for that purpose, in the parish where the property is situated.

**A** PPEAL from the Seventh Judicial District Court, parish of West Feliciana. Yoist, J.

*Saml. J. Powell* for plaintiff and appellant.

*W. W. Leake* for defendant and appellee.

The opinion of the court was delivered by

EGAN, J. On the fourteenth of February, 1877, the relator in the first and plaintiff in the second action sold to James P. Bowman the Hazelwood plantation, in the parish of West Feliciana, for \$6500, payable in three annual installments, and retained in the same act a mortgage to secure the price. She caused a certified copy of the act of sale and mortgage, which had been passed before a notary in New Orleans, to be sent to the recorder of the parish where the land lay for registry. It was received by him on the seventh of March, 1877, and indorsed "filed

for record on the seventh of March, A. D. 1877, and truly recorded same date in notarial record book R, pages 434 and 435, and in mortgage book H., pages 149 and 150, July 5, 1877." Subsequent to the registry of the act in the book of conveyances, but prior to its registry in the book of mortgages, the land was seized under *feri facias* at the instance of creditors of the vendee, Bowman. Whereupon the vendor, Mrs. Slocomb, sued out a mandamus to compel the recorder to register her mortgage as of the date of the filing of the paper in the recorder's office, to wit, March 7, 1877, and to give it rank accordingly. She also sued out an injunction to stay the sale until the question of her rank and rights could be adjudicated, and prays that her mortgage may be decreed to have been "virtually and legally transcribed in the mortgage records of the parish where the land lay from the date of filing of the act in the recorder's office, seventh of March, 1877, and that it take effect on the property sold from date; that her mortgage be deemed superior to the rights of the seizing creditor and the proceeds distributed accordingly; and that the recorder be required to make out for the purposes of the sheriff's sale a certificate giving her mortgage the rank so claimed for it."

The view we take of the matter in controversy makes it immaterial in this inquiry whether, as stated by the recorder, he was instructed by plaintiff's attorney to record the act in the book of conveyances specially without any instructions as to registry in the mortgage-book, or whether, as stated by the counsel, the instructions were general and simply to record the act, presuming that the recorder knew his duty and would record it both in the book of conveyances and of mortgages. For the same reason, it is unnecessary to consider a bill of exceptions taken to the reception of parol evidence of the contents of the lost letter of instructions accompanying the act. So far as relates to the mandamus case, we may as well now remark also that the exception to the reception of evidence of the existence of other judgment and mortgage creditors was not well taken. In a proceeding which would so materially affect their rights and rank if successful, they were necessary parties, and the evidence was properly admitted to show that in this proceeding the recorder could not be compelled to disregard the registered rights of others not parties to the proceeding, or to give on the books of his office now a priority to the relator's mortgage over them. See 6 R. 299; 8 R. 97; *Young & Wann vs. Hays*, Recorder, 14 An. 654. The real and only question at issue here is whether or not the filing of the act of mortgage in the recorder's office has the same effect as the transcribing or recording of the act in the book of mortgages. We have been referred to the case of *Payne vs. Pavay*, 29 An. 116, decided by us at the last term in New Orleans, as conclusive of the question. That case only

determined the effect of the filing of a conveyance of lands in the office of registry, and it was correctly held under the positive and unequivocal provisions of the Civil Code that the conveyance took effect as to third persons from the date of filing in the proper office, although not actually recorded or transcribed in the books until long afterward, and we expressly declined in that case to express any opinion as to whether the same rule prevailed in regard to mortgages. It may be, and indeed is, argued that there is no good reason for a distinction, and that the same rules should apply to both. In the Pavey case we said what we have now occasion to repeat, that "the laws of registry are arbitrary," and that in many cases this court has considered itself bound to refuse relief, because "*ita lex scripta est*." However arbitrary the distinction may seem, and in fact is, the provisions of the law in regard to the time from which sales and mortgages shall take effect against third persons are essentially different. As we held in the Pavey case, conveyances take effect against third persons by the positive and express terms of the law from the time they are deposited and filed for registry in the proper office. In regard to mortgages which are *stricti juris* on the other hand, the Civil Code, art. 3329, provides in express terms that "among creditors the mortgage whether conventional, legal, or judicial, has force *only from the time of recording it in the manner hereafter directed*;" article 3342, that these mortgages are only allowed to prejudice third persons when they have been publicly *inscribed* on records kept for that purpose, and *in the manner hereafter directed*;" article 3345, that "all mortgages, whether conventional, legal, or judicial, are required to be recorded in the manner hereafter provided;" and article 3348, that "any person entitled to a mortgage or privilege on the property of another person must cause the evidence of such mortgage or privilege to be recorded *in the mortgage book* of the parish where the property is situated." We here find not that mortgages like conveyances take effect from the time they are deposited or filed in the proper office, but only from "the time they are" actually "*inscribed*" "on records kept for that purpose," and that the recording must be in the mortgage-book of the parish where the property is situated;" and so it has often been held that the registry of a mortgage in the book of conveyances though in the proper office is insufficient and without effect as to third persons, the only exception being where it appears that only one book of record is kept, in which both sales and mortgages are registered indifferently. See 5 An. 154; 16 An. 435; 24 An. 78, and authorities cited.

In the 16th An. case, *Carpenter vs. Allen*, Judge Merrick said: "A mortgage is a real right, a *jus in re*, which in general, so far as third persons are concerned, can only be created by an observance of the forms of law." In *Taylor vs. Hotchkiss*, 2 An. 917, it was held that a legal

registry alone gives effect to the mortgage as to third persons, as to whom it is valid not as executed between the parties, but as recorded. For any error in the registry the mortgagee must suffer, saving his recourse against the recorder. See, also, *Walden vs. Grant*, 8 N. S. 570. Again, it has been held that the remedy of the creditor who loses his rights for want of a proper inscription is against the officer in damages. His fault or fraud can not be visited upon the public. 4 R. 5; 2 An. 606, 800; 5 An. 632. In *White vs. the Union Bank*, 6 An. 162, and *LeFlore vs. Carson*, 7 An. 65, it was expressly held that it is not enough for one holding an act giving a privilege to deposit it with the proper officer to be recorded; he must see that it is done, or he will lose his privilege. In the 6th An. case, of *White vs. Union Bank*, Judge Slidell, as organ of the court, said: "We have been invited by appellant's counsel to reconsider the opinions given in *Ells vs. Sims* and *Perot vs. Chambers*, 2 An. 253 and 801 (cases of imperfect or irregular registry held bad), and this mainly upon the ground of the strong equity of a vendor to show the price of the thing sold has not been paid. We have duly considered the arguments of counsel, and have not been able to reconcile a departure from those decisions with the express requisitions of the Code, nor to distinguish the facts of this cause from those of the cases referred to. It is the privilege of the vendor which *Merrill* claims; and we could not have decided the cases referred to in favor of such a claimant without expunging from the Code the article 3238, which declares that the vendor of an immovable or slave only preserves his privilege on the object when he has caused his act of sale to be duly recorded at the office for recording mortgages in the manner thereafter directed." The same provision is contained in art. 3271 of the R. C. C. of 1870 as to the vendor's privilege upon immovable property *whatever may be the amount due him on the sale*. And by articles 3273 and 3274 "privileges are only valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law" and "no privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property is situated." In the *Union Bank* case, just quoted, Judge Slidell further says: "It is contended that a party holding a deed of mortgage or act from which a privilege results, has done all that the law requires of him to preserve his rights when he has deposited the act for record in the proper office and with the proper officer. But this proposition is inconsistent with the article 3238, which requires the creditor to cause his privilege to be duly recorded. Supposing a prior and a subsequent mortgagee to be both innocent parties upon one of whom the negligence of the public officer must fall, it is more equitable that they should be borne by the former than the latter; because by diligence he could have assured himself that the mortgage



was inscribed; whereas, the second mortgagee has in general nothing to rely upon but the officer's certificate of freedom from incumbrance." In the 7th An. case of LeFlore vs. Carson, p. 67, the court through the same organ, Judge Slidell, re-affirms the doctrine in White vs. Union Bank, 6 An., from which we have so freely quoted. In view of the authorities cited and of the textual provisions of the Civil Code we are of opinion that Mrs. Slocumb's privilege and mortgage was not preserved as against the seizing creditor or others of prior registry, and that she can neither successfully assert its superiority over them nor compel the recorder to give to her mortgage any other place or date upon the books of his office than it now holds. It may not be amiss to remark, also, that even according to the statement of her own attorney he gave no specific instructions to record the mortgage in the proper book or to record the instrument as a mortgage, and it is shown by the evidence that neither he nor any one else ever paid or offered to pay the fees for such registry until the time when the mortgage was actually inscribed. We think this a proper case to apply the rule laid down by Judge Slidell in the cases cited, and with him we may say that if the plaintiff is unpaid the resolatory condition remains to her. The provision of articles 2264 and 2266 C. C. under the general head of registry of conventional obligations can not control the specific provisions under that head in regard to the registry of mortgages and privileges which we have quoted.

It is therefore ordered, adjudged, and decreed that the judgments appealed from which denied the mandamus and dissolved the injunction be and they are affirmed with costs of appeal.

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CONCURRING OPINION.

MANNING, C. J. It is the duty of the Recorder of each parish to write on the back of each Act he receives, the time it was so received, and to record all acts without delay in the order in which they are received. These acts shall have effect against third persons only from the date of their being deposited in the recorder's office. Rev. Stats: sec. 3081.

There is no distinction made here between different kinds of acts, and if this provision stood alone, all acts would take effect from the date of their deposit in the Recorder's office, and the filing written upon them by that officer would fix that date. But art. 3238 of the Civil Code (new no. 3271) requires the actual recording of the vendor's privilege on land to enable him to preserve it, and a new article in the last Revisal, numbered 3348, which however is only a reiteration of the Act of 1869 (sec. 8 p. 116), compels persons who are entitled to a mortgage on the

property of another person to cause the evidence of such mortgage to be recorded. A mortgage must therefore be not only filed in the recorder's office, but must be recorded in the proper book, in order to have effect against third persons.

I do not think however that it is necessary for a party or her attorney to give specific instructions to a Recorder to record an Act in a particular book. The Recorder is presumed to know his business and duty, and though the presumption is sometimes a violent one, it must be held to legally exist. It is his duty to record the Act in both the conveyance and mortgage books, if the act contains both a conveyance and a mortgage, and to do it without instructions. Neither do I think that a person is obliged to offer or actually tender the fees to the recorder when he delivers the act to him, in order to entitle the party to have the act recorded. The recorder can demand the payment, and the instant payment of the fees, and if he does demand them, and the party refuses or neglects to pay them, he will have only his own negligence to blame for the non-recording of his act. But if the act is delivered to the recorder, and he files it, and says nothing about the fees, he has induced the party to believe that he waives his right to the instant payment of them, and he can not afterwards excuse himself for his omission to record the act on the ground that his fees were not tendered. Nor do I believe that such defence would avail in an action on the recorder's bond for damages sustained for not doing his duty in recording the act.

It may be fortunate that the relator has a remedy by the resolatory action. I concur in the decree.

MARR, J. I concur in this opinion.

No. 6998.

WALTER C. COMPTON vs. WM. L. SANDFORD.

Parties are estopped from denying admissions or declarations deliberately made by them in judicial proceedings.

Judgments which are not absolutely null and void, can not be attacked in any collateral manner.

The issue of title to certain property, passed on by a final judgment, can not be raised again in a subsequent suit between the same parties.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides, Blackman, J.

*R. J. Bowman* and *M. Ryan* for plaintiff and appellee.

*James G. White* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 3d of October 1866, George W. Compton bor-

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Compton vs. Sandford.

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rowed from William L. Sandford, eighteen hundred and eighty-seven dollars. To evidence that loan, Compton executed a note payable in January 1867, and secured its payment by mortgage on a plantation situated in the parish of Rapides. That note was not paid at its maturity, and—in January 1874—seven years after it had matured, Sandford obtained judgment for its amount, with a recognition of the mortgage securing its payment.

On the judgment thus obtained, execution issued, the hypothecated land was seized and the seizure enjoined by two separate and distinct actions, one filed in the names of the heirs of Mary E. Compton, on the ground that—with the exception of one hundred and fifty acres of said land, alleged by them to be the property of Angus Compton, the balance of the same belonged to them by inheritance from their mother—and the other filed in the name of Angus Compton, on the ground that he owned the one hundred and fifty acres acknowledged by his co-heirs to be his property, by purchase from Mrs. Hamilton and Frank and John S. Henderson.

The first mentioned of said injunctions was decided in favor of the heirs of Mary E. Compton, who—by the decree of the court—were declared the owners of the hypothecated land, less—of course—the one hundred and fifty acres alleged by themselves to be the property of Angus Compton; and the latter's injunction—as to that portion of said land—dissolved by a judgment rendered on the fifth of June 1875. From this judgment no appeal was taken; from the other, Sandford appealed, but without success: the judgment rendered against him and in favor of the heirs of Mary E. Compton was affirmed by this Court.

An alias execution was then issued on the judgment of Sandford against George W. Compton, and—under that second execution—the one hundred and fifty acres of land disclaimed by the heirs of Mrs. Compton, and the intended sale of which her son Angus had vainly attempted to prevent, was again seized to satisfy the aforesaid judgment.

This last execution and the sale of the land seized under it were enjoined by Walter C. Compton, the plaintiff in this suit, who avers that the portion of land thus levied upon belongs—by inheritance—to him and the other children of Mary E. Compton, and is still held in indivision between them: that, as one of the children of said deceased—and not otherwise—Angus is entitled to a share in said land: that, until a partition fixing the locality of his own share therein, he can not be deprived of his ownership over the entire tract inherited by them from their mother, and that the acknowledgment by his co-heirs and his under tutor in the injunction suit, "that Angus is the owner of a fraction of that entire tract," is not binding upon him, for the reason that said acknowledgment was made whilst he was under age, and—so far

as he is concerned—by Angus himself, who was then his under-tutor, and claiming for himself the whole of the fraction alluded to.

The answer to plaintiff's demand denies that, either at her death or at any other time, Mrs. Mary E. Compton owned the land in question or any separate property.

If—under the pleadings—we could consider the evidence adduced of Mrs. Compton's title to the property mortgaged by her husband and seized to satisfy that mortgage, what does that evidence show? that, in 1843, Mrs. George W. Compton obtained judgment against her husband for a sum which, as testified to by one of the witnesses, did not exceed two hundred and fifty dollars, and—by another—four or five hundred dollars. Under two executions issued, one on her judgment—the other, on a judgment in favor of the heirs of Samuel Compton, the whole of the property of George W. Compton was seized, offered for sale and purchased by his wife for twenty thousand two hundred and ninety-one dollars, and that was, according to one of the witnesses, more than eighty times the amount of her judgment, and—according to another about forty or fifty times said amount.

During the month of May 1864, the courthouse of the parish of Rapides, and the records and papers therein contained were destroyed by fire, and—in 1868—an act was passed by the Legislature to amend a previous act which provided for the supplying of said records and papers, among which were the judgment of and the sheriff's sale to Mrs. George W. Compton.

The 3d section of said act is in these words: "That the party defendants in all applications for that purpose shall have the usual legal delay as in other suits, but when the said party answers he shall admit the petition or deny it partially or wholly, and said denial shall be under oath: whereupon the judge shall proceed to the trial without the intervention of a jury, and upon hearing the evidence shall decide and render judgment, establishing or not, the destroyed deed, bond, mortgage, judgment or other writing as the evidence proves to have existed."

The 4th Section provides: "that if the plaintiff or applicant makes oath to the allegations of his petition, it shall be *prima facie* evidence of the existence of such deed, bond, mortgage, judgment or other writing &c."

On the 14th of May 1869, Mrs. Compton filed an application in the district Court for the parish of Rapides, to have re-instated the sale of the 7th of October 1843, from the sheriff to her. Her husband accepted service of the wife's unsworn application, waived time—meaning, at least we so presume, the delay allowed by law for answering, and—on the 17th of May 1869—a decree was signed re-instating the applicant's title, though no default had been taken against, no answer made by the defendant.

The property referred to in said decree was adjudicated to Mrs. Compton for more than twenty thousand dollars, the fortieth part of which, at most, could have been applied to the execution issued on her judgment, the evidence of which was destroyed by the fire of 1864 and has not been re-established. What became of the balance of the price? The most of the property thus acquired by her composed the separate estate of her husband, and it may be that said balance was the consideration of the alleged reconveyance of the land in dispute from the wife to the husband. If so, the transfer was authorized by our Code.

Rev. C. C. art. 2446, number 1.

Not only did George W. Compton mortgage this land to Sandford, but he also mortgaged it to W. C. James, the tutor of the minors Henderson, and when—in payment of the latter's claim, the said Compton conveyed them the one hundred and fifty acres which plaintiff alleges that he and his co-heirs inherited from their mother, Mrs. Compton intervened in the act of sale and renounced in favor of said minors to any right which she then had or may have had on the property so transferred to them.

It is true that her renunciation to any rights which she might have exercised on that tract of land, could and did not divest her of any title to the land itself: but, is not that renunciation at least a presumption that—legally or otherwise—there may have been a reconveyance from Mrs. Compton to her husband? Whether there was or not, it is now useless to inquire, and why? The rights and the extent of the rights of plaintiff and his co-heirs, as regards the tract of land now seized, are fixed by two judgments and the judicial admissions made in the pleadings on which those judgments are based. The fact that Angus Compton was the owner of said tract, is not merely acknowledged, but fully established by a notarial act—and neither the judgment which recognizes the title of the heirs of Mrs. Compton, to the whole of the land claimed by them, and—as an irresistible inference—the title of Angus to that part of said land which was, not only not claimed by said heirs, but expressly excepted from their demand as belonging to said Angus—nor the judgment dissolving the latter's injunction have been attacked in nullity by plaintiff, and the first mentioned of those two judgments has been affirmed by the Supreme Court.

If, by his pleadings, plaintiff had re-opened the litigation closed by those decrees, and had supported his mother's alleged title, by none other but the evidence which we have before us, we might well have hesitated to acknowledge the validity of that title; but that litigation was and remains closed, and—coupled with the evidence adduced on the trial—plaintiff's pleadings do not justify his injunction.

As to defendant's admission that "subsequent to the sale made by

the sheriff and his deed to Mrs. Compton, a reconveyance was made by her to G. W. Compton many years before the youngest of the plaintiffs was born," it can not be legally divided, and for the reason already stated, that Mrs. Compton was judicially separated in property from her husband, and may have transferred that land to him in payment of the balance due by her of the price of the adjudication to her of property inherited by and belonging to her husband; nor can that admission be justly disconnected from the assertion found on the same page that said land was not the property of Mrs. Compton at the time of her death. Besides, these declarations were made and passed upon in a controversy finally determined by a decree of the district Court, signed on the 5th of June 1875 and affirmed by this Court. In this case, the validity of the wife's judgment is denied, and her pretended title assailed as fraudulent and absolutely null. As to a part of the land, that title is protected by the aforesaid decree, which, however, does not cover the tract of one hundred and fifty acres; and—as to that tract—the injunction sued out by Angus to release its seizure and prevent its sale, was dissolved on the very day on which that of Mrs. Compton's heirs was perpetuated—on the 5th of June 1875, and—from the decree dissolving Angus' injunction no appeal was taken.

The plea of *res judicata* filed and urged by defendant must prevail, and this conclusion dispenses us from discussing the other questions raised in the briefs and bills of exceptions. That conclusion leaves no doubt that plaintiff has abused the equitable writ of injunction.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is amended, plaintiff's injunction entirely dissolved, and he, Angus T. Compton, and J. S. Compton—his sureties on the injunction bond, condemned *in solido* to pay to William L. Sandford, as damages, ten per cent upon the amount of the judgment, the execution of which was enjoined, with costs in both Courts, and—as thus amended—the decree of the Court *a qua* is affirmed.

The Chief Justice, having been of counsel in this case, recused himself and took no part in this decision.

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No. 6915.

THE STATE VS. ALBERT WILLIAMS.

A verdict of conviction will not be set aside on the ground that the State's Attorney refused to call and examine three witnesses present at the trial of the case, and alleged to be cognizant of all the facts of the case, when there is no averment, in the bill of exceptions that the accused was prejudiced thereby, and when there is nothing to show that he did not have a fair and impartial trial.

## State vs. Williams.

The crime of murder can not be prescribed. Time therefore is not of the essence of that offense, and therefore the time stated in the indictment is, in general, not material.

As affecting the question of prescription, as to prescriptible offenses, evidence is admissible to show that the accused was a fugitive from justice, from the time the act charged was committed.

A general allegation, in an exception, that the charge of the lower judge "*is not laic*," is too vague.

**A**PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J.*

*H. N. Ogden*, Attorney General, for the State.

*Folse* for defendant.

The opinion of the court was delivered by

EGAN, J. The accused was charged with murder and found guilty without capital punishment. The case comes before us on three bills of exception, the first of which is to the refusal of the court at the request of the prisoner's counsel to compel the district attorney to call and examine on behalf of the State three witnesses, stated to be then present in court, and to be fully cognizant of all the facts submitted for investigation. The judge *a quo* refused to so order, as he states, because it seemed in violation of what had always been understood to be the law of this State, and this was the only case of the kind which had ever come to his knowledge. He states further that two of the witnesses named were relatives of the accused; the third was not. It appears from the bill that at the time it was proposed to call the witnesses in question, the State had already examined four or five witnesses on behalf of the prosecution, and the district attorney had announced that the testimony of the State was closed. The counsel for the accused relies upon the authority of the case of *Hurd vs. the People*, 25 Michigan, 405, in which it was held "that the prosecutor in a criminal case is not at liberty like a plaintiff in a civil case to select out a part of an entire transaction which makes against the defendant and then to put the defendant to proof of the other part *so long as it appears at all probable from the evidence* that there may be any other part of the transaction undisclosed; especially if it appears to the court that the evidence of the other portion is attainable," and refers to the case of *Maher vs. the People*, 10 Michigan, 225-26, to the effect that it is the well-established rule of the English courts that all witnesses present at the transaction should be called by the prosecution before the prisoner is put upon his defense if such witnesses be present, citing 8 C. & P. 559, *Orchard's case* same; note *Roscoe's Criminal Evidence*, 164. The court however says: "Whether the rule should be enforced in all cases when those not called are near relatives of the prisoner or some other special cause for not calling them exists we need not here determine. Doubtless where the

number present has been very great, the production of part of them might be dispensed with after so many had been sworn as to lead to the inference that the rest would be merely cumulative and where there is no ground to suspect an interest to conceal a part of the transaction."

It appears from the head note, and so we interpret these *dicta*, that the court held it to be the duty of the prosecution to put in evidence "the whole of the *res gestæ*."

It is as true in Louisiana as elsewhere, as the court remarked in the 25th Michigan case, that "the prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simple justice; and he has no right to sacrifice this to any pride of professional success." This we have announced substantially in more than one decision since we have been upon the bench, and were a case before us in which it appeared that any unfair advantage of the accused had been taken in the progress of the trial in any important particular likely to influence the result, we should not hesitate to set aside the conviction. In the present case, however, there is no such statement in the bill of exceptions; nothing but the bare refusal to call and examine on behalf of the State the witnesses named. Neither the evidence given by those witnesses already examined nor that proposed to be given by the others is before us. We are therefore unable to determine for ourselves whether this case comes within the rule announced in the 25th Michigan case or not. The bill discloses no circumstance of suspicion, even, that a fair and impartial trial was not afforded the accused. The State had already examined four or five witnesses as to the facts of the case, and had rested the case for the prosecution. It is not suggested that the case thus made was imperfect, or that evidence given disclosed or rendered probable the existence of other or fuller evidence, or even that the witnesses proposed to be called were present at the homicide. If they were, *non constat* but that their evidence would have been merely cumulative of that given by the four or five witnesses already examined. Some discretion must under the rule invoked be allowed both to the district attorney and the court *a qua* in a matter of this kind, and there is nothing to show that in this instance it was not properly exercised. The jury were the judges of the sufficiency of the evidence of guilt of the accused, and found him guilty. The rule in question has never prevailed in the courts of this State, nor are we prepared to admit the proposition that it is the settled rule of the English courts. We think otherwise, except with the modifications stated, and that as a rule the prosecuting officer of the State, who should be always mindful that, as said by us in another case, the State wishes no unfair advantage taken of any one accused in her courts, still has discretion to select his witnesses and manage the prose-



ection according to his best judgment under the eye and proper direction of the court," whose duty it is also to see that a fair and impartial trial is accorded to the accused. It is to be presumed that this was done in the case at bar, and this ground of exception is overruled.

The second exception is to the reception of evidence that the accused was a fugitive from justice from the time the act charged was actually committed: first, because as affecting prescription, that was a question solely for the court and not for the jury; second, because no evidence of fleeing from justice prior to the date stated in the bill of indictment was receivable, and that the evidence received was of a fleeing from justice after the actual commission of the act charged, but more than one year before the time stated in the indictment. Of this it may be remarked, 1. That time is not of the essence of the offense here charged, and therefore the time stated in the indictment is in general not material. 2. That as affecting the question of prescription the evidence was properly received, as *otherwise* the accused might have asked the court to instruct the jury, and such would have been the duty of the latter, to acquit the accused in case they should find from the evidence that he had been guilty of manslaughter only, and that more than twelve months had elapsed since the commission of the act. 3. That the jury did find the accused guilty of the imprescriptible crime of murder, although they qualified their verdict by adding under the statute "without capital punishment." The fact of fleeing from justice has always been considered a circumstance of suspicion of guilt receivable in evidence in a criminal case, and in the present case the court *a qua* instructed the jury to disregard all evidence of fleeing from justice before the time charged in the bill. This ground can not be maintained.

The third and last exception is, that the written charge of the judge *a quo* to the jury "is not law." We have not been favored with a brief by the counsel for the accused, nor are we informed in what respect the charge is not law, and we do not perceive it. As a whole the charge seems to us, if any thing, rather more favorable to the accused than perhaps strict law would warrant, and is in the main but the enunciation of well-established principles. The exception is too vague and general, and should have pointed out the particulars in which the law was violated by the charge of the judge, which occupies a dozen pages of the transcript. This ground is not well taken.

The judgment appealed from is affirmed.

No. 6715.

## THE STATE VS. HENRY SMITH.

The General Criminal Statute enacted by the Legislature of this State May 4, 1805, did not adopt, as a portion of our law, all the crimes and misdemeanors known to the Common Law at that date. It merely adopted the Common-Law definitions of those offenses declared to be crimes by that act, and incorporated as a part of our system, the Common-Law mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other Common-Law proceedings in criminal cases.

The crime of incest, although denounced, is not defined by any statute of Louisiana, and hence, there can be no conviction for incest under the laws of this State.

**A** PPEAL from the Second Judicial District Court, parish of Orleans.  
*Pardee, J.*

*H. N. Ogden*, Attorney General, and *A. G. Brice*, District Attorney, for the State.

*Saml. S. Carlisle* for defendant.

The opinion of the court was delivered by

**MANNING, C. J.** The defendant was convicted under an indictment for incest, and was sentenced to imprisonment at hard labor for life.

The counsel for the prisoner asked the court to charge the jury, that the crime of incest, not being defined by the criminal statutes of Louisiana, must be defined and construed according to the common law of England as it existed at and previous to the enactment of the Act of 1805, and that as incest was not a crime at common law, or defined thereunder in 1805 and previously, no conviction could be had under the statutes of this State.

The court refused the charge, and the prisoner reserved a bill, and appealed.

It is noteworthy that this is the first prosecution for incest ever brought before this court, and so far as we are advised, the first one ever instituted in this State.

The act of May 4, 1805, provides "that all the crimes, offences, and misdemeanors herein before named, shall be taken, intended, and construed according to and in conformity with the common law of England; and that the forms of indictment, (divested however of unnecessary prolixity) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences, and misdemeanors, charging what ought to be charged, shall be, except as is by this act otherwise provided for, according to the said common law." sec. 33.

Observe that the statute specifically directs how all the crimes, offences, and misdemeanors *herein before named* shall be taken, intended, and construed, and how the prosecution of *the said crimes*, etc. shall be

conducted. Among the many offences named in the preceding sections, for the commission of each of which a punishment is prescribed, that of incest is not to be found.

It has been held "that the legislature, in adopting the common-law rules of proceeding (procedure?), method of trial, &c adopted the system as it existed in 1805, modified, explained, and perfected by statutory enactments (of England) so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions." *State v. M'Coy*, 8 Rob. 545. But this decision, the soundness of which the profession have uniformly recognised, was digested by the then reporter with a different phraseology, having a more enlarged application than the text warrants, and Mr. Hennen has transcribed the Reporter's version instead of that of the opinion, and so has perpetuated the error. For it will be seen that the opinion speaks only of the common-law *rules of procedure, method of trial, &c* modified by England's statutory enactments before 1805, as the system that was adopted by our act of that year, while the digest of the Reporter is, that the legislature in passing that act "must be understood as having adopted *that system of law* as it existed in 1805, modified" &c.

It was not decided by this court in that case that every act which was an offence at common law in 1805 was thereby made an offence here, nor is that a proper legal construction or reasonable intendment of the Act. On the contrary, with the manifest purpose of shutting out such construction, the Act of 1805 devotes thirty-two sections to providing how all the crimes should be punished which the legislature chose to visit with punishment, and as these crimes had specific designations in the common law, such as murder, rape, arson, etc. with well defined meanings, the act declares that those crimes, which had been already named in it, should be construed in conformity with the common law of England, that is to say, that the definitions of those crimes which were accepted or established by the common law, should be held as defining them here, and the mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other proceedings, shall be as at common law. But the Act does not adopt the whole criminal law of England as it existed in 1805. It is only the definitions of those offences that are named in it, and the mode of procedure for criminal prosecutions, that were adopted by that Act. And it may be added that the omission from the re-enacted statute of the words 'herein before named,' (Rev. Stats. 1870 sec. 976), and the use of terms which embrace all crimes, does not affect the argument, as we shall see when we come to inquire whether this crime was one at common law, or by statute of England.

The 48th. section confirms this view of the intent of the legislature,

where it is enacted—"that as soon as may be, after the passing of this act, the governor shall cause to be drawn up and printed and promulgated in the English and French languages, an exposition and explanation of each and every of the crimes and misdemeanors herein before mentioned, which are not herein precisely defined, and of the rules of evidence, the mode of trial, the forms of writs and indictments, and all other proceedings as they are directed to be had in the 33d section of this act." It was a definition only of each and every of the crimes and misdemeanors mentioned in that Act that was required, plainly demonstrating that henceforward no others were denounced by the law—that no other acts than those which constituted the crimes, known to the English common law by the names used in the statute of 1805, should be visited henceforth with punishment.

This interpretation is put beyond the possibility of cavil by the fact that in 1817, an act was passed supplementary to that of 1805, creating new offences, the first mentioned among them being the abominable crime of incest.

The definition of the crimes, directed to be made by the act of 1805, was not made. The thought then in the mind of the legislature may have been the germ of Mr. Livingston's Code, and it is not the least of the many singular features of this subject, that although that Code was compiled many years after 1817, no mention is made in it of this crime.

The Attorney General contends that incest was known as a crime to the common law of England long before 1805, and had often been punished—that while it is true, the Ecclesiastical Courts alone had jurisdiction of the offence, the common-law courts exercised the power of controlling and regulating the jurisdiction of the Ecclesiastical Courts in determining within what degrees of affinity and consanguinity the crime could be committed. 3 Blk. Com. 87. His argument therefore is that it was made a crime here by the Act of 1805.

But we have already seen that the Act of 1805 did not adopt all the crimes and misdemeanors known to the common law at that date, but did set forth specifically the particular crimes and misdemeanors which henceforth should be deemed offences against the State, and incest was not one of the number.

It is not mentioned in the statutes until 1817, and then and ever since it appears with the brief denunciation—whoever shall commit the crime of incest shall, on conviction thereof, suffer imprisonment at hard labor for life. Rev. Stats. 1870. sec. 789.

But what is incest? It has not, like murder, a fixed and definite meaning everywhere. An act that is incest in one country is not criminal at all in another country. Nay more, an act that is incest in one of our sister States is not so in all. No man may marry his brother's

widow, or his wife's daughter in Virginia, (Code, p. 470) nor within the Levitical degrees of consanguinity or affinity in Georgia. (Stat. Law p. 742), nor his son's widow or uncle's widow in Mississippi (Code, p. 494), but none of these marriages would be incestuous in our State, except as to some of the Levitical degrees.

The 'Digest of the Civil Laws in force in the territory of Orleans,' published by authority in 1808, has this prohibition;—Marriage between persons related to each other in the direct ascending or descending line is prohibited. This prohibition is not confined to legitimate children, but extends also to children born out of marriage. Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or of the half blood, whether legitimate or illegitimate, and also between the uncle and the niece, the aunt and the nephew. Title IV c. II arts. 9, 10. These prohibitions re-appear in our Civil Code (arts. 96, 97 new nos. 94, 95), and there is added the declaration that all other impediments on account of relationship or affinity are abolished. art. 98 new no. 96. So also our Code defines incestuous bastards to be those who are born of two persons who are relations within the degrees prohibited by law, (art. 202 new no. 183) and inflicts upon them disabilities, (arts. 217, 222, 914, 1475 new nos. 193, 204 with altered phraseology, 920. 1488.)

But here, is interposed the objection that these articles of the Civil Code relate only to the civil disabilities imposed upon the *issue* of marriages within the prohibited degrees. They do not impose criminal penalties upon the persons who thus marry. That Code of necessity, and from its nature and object, does not treat of crimes or their punishment.

It is therefore true that while our criminal statute attaches a punishment to the commission of incest, nowhere in our law is that crime defined. Shall it be said that the Act of 1805 does not define the crime of murder, and that no one will pretend that murder, for lack of such definition, is not a crime by our law? The Act of 1805 does attach a penalty to the crime of murder, and does not to the crime of incest, and then provides that all the crimes *named in the Act* shall be taken and construed according to the common law of England. Is a crime not named in the Act to be construed according to that law? Criminal statutes must be construed strictly in favor of a party charged with their violation.

But we will consider the matter *arguendo* in the light most favorable to the State. Incest was not made a crime by the Act of 1805, but it was by the Act of 1817. Since then the Act of 1805 provided, that all the crimes named in it should be construed by the common law of England, it may be assumed that whenever any act is thereafter made a crime by our law, it intends that such crime shall also be construed

according to that law, so that when incest was made criminal in 1817, we have but to revert to the common law definition to ascertain what it is.

Incest was neither defined nor punished by the common law of England at or before 1805. It was punished by statute in that country, and death was the penalty, and its definition was supplied by the canon law. Says Blackstone—"in the year 1650 when the ruling power found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilfull adultery were made capital crimes, but also the repeated act of keeping a brothel or committing fornication were, upon a second conviction, made felony without benefit of clergy. But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual courts, according to the rules of the canon law." 4 Com. 65. England has again made incest a statutory offence since 1805.

If then we are to take and construe this crime as it was taken and construed by the common law of England in 1805, because our statute of that year directed that certain enumerated crimes should be thus construed, albeit incest is not one of them, we are met by the want of any common law definition of it, although the canon law contained one, and if we shall take the canon law definition, because it was adopted by the common law, then an act which was punishable as incestuous by the law of England in 1805 was not punishable here.

The State at this point contends that the legislature passed the act punishing incest with reference to the well established and received definitions of that word in books of authority. That would be a dangerous rule to apply to the construction of criminal statutes. Our statute is unlike any other. It lacks that precision which should always characterize the creation of a crime, and the imposition of a punishment. Elsewhere, the statutes enact that whoever shall intermarry, or cohabit, being within the degrees of consanguinity within which marriage is prohibited, shall be deemed guilty of incest. Archbold, Crim. Prac. & Pl. 615—8 *et seq.* Our statute is simply, 'whoever shall commit the crime of incest'—a crime which has not a fixed and definite meaning of itself, which varies in different countries and even in different parts of the same country, so that an act, undeniably lawful in one, is incestuous cohabitation in another.

Waterman tells us, writing of the criminal statutes of the States, that in making adultery punishable in the common law courts, they do not give a definition of the offence, and that such is frequently the case as to the higher crimes. "They are not defined in our statute book,

but are assumed to be well known as offences at common law; and under the general term denoting the offence, it is declared by law to be a crime, and the mode of trial and measure of punishment are alone prescribed by statute. If questions arise in such cases as to what constitutes the offence, recurrence is to be had to well established definitions, sanctioned by books of authority and adopted by long usage, and with reference to which, it may be supposed our legislatures have acted in passing the law punishing the offence." But he adds, "It so happens, that on the present question (adultery) we derive less aid than usual from the lights of the common law, the crime of adultery not being cognisable by the temporal courts in England as a public offence, but only as a private injury, and hence we have not that distinct character of this crime well defined and made familiar to us by the books of common law that will be found to exist in relation to other offences." Archbold, Crim. Prac. & Pl. notes 615.

That is precisely the difficulty in the present prosecution. And it is not removed by arguing from modern enactments, that they make offences, the injuring or destroying any line of telegraph, or railway, or stuffing ballot boxes, and that to ascertain their meanings we can not go to the common law, but must understand and construe those words in their ordinary and usually accepted signification. Injuring a telegraph or railway means the same thing in England that it does in America. Stuffing a ballot box means the same thing in Massachusetts as in Louisiana. But incest means a totally different thing in each of these places.

We are compelled to discharge the prisoner, and in doing so, we call the attention of the legislative department of the Government to the defect in the statute, to the end that it may be speedily remedied. It should declare that intermarriage or cohabitation between persons within the degrees of consanguinity within which marriage is unlawful, constitutes the crime of incest, or such words as are used elsewhere in other criminal statutes, and which have always been held to be necessary for the proper definition, and punishment of this and crimes which like this vary in meaning according to the temper, or religious notions of different countries. For much curious learning on this matter, *vide* Shelford on Marriage and Divorce, 154 *et seq.*, and for computation of degrees, Cooper's Justinian, notes 422—431.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, the verdict of the jury is set aside, and the prisoner is ordered to be discharged from custody.

No. 7027.

THE STATE VS. GEORGE TENNANT ET AL.

The citation of appeal, in a case where the State is a party, must be served on the attorney for the State who has obtained the judgment appealed from. If absent, the service must be made at his domicile as in ordinary cases.

The obligation of sureties on a bail bond is not affected by the fact that the indictment was found for an offense of a higher grade than that expressed in the bond, and which higher crime includes the lower.

It is sufficient, if by the terms of the bail bond, the offense is substantially although not technically described.

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

*J. H. Lemon*, district attorney, for plaintiff and appellee.

*Herron, Bird & Beale* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. George Tennant, George Brown, and seven others were indicted for murder, notwithstanding which, it appears that the two above named were bailed. The bail bond was forfeited, and the three securities have appealed by petition from the judgment of forfeiture.

The citation of appeal was directed to the district attorney, and served upon a person residing at his domicile, he being absent, and he insists that in that case, the service should have been on the district attorney pro tem. He moves to dismiss on that ground.

It has been held that the attorney for the State, who has obtained the judgment appealed from, is the officer upon whom the citation of appeal should be served. *State v. Placenzia*, 6 Rob. 441. If he be out of office, the service should be upon his successor, but if still in office, and absent, as was the case here, the service should be at his usual residence in the manner required by law for such service. The fact that another officer performs temporarily his active functions, during his absence, will not justify us, in the absence of any legislation on the subject, in requiring that service of a citation of appeal should be served vicariously on such other officer.

Another ground for the motion to dismiss is, that two of the securities, appellants, enjoined the enforcement of the judgment on the same grounds upon which this appeal is based, and appealed from the judgment dissolving their injunction, and then abandoned their appeal. If there were any evidence of this, the action of two of the appellants could not prejudice the rights of the third security, but there is nothing whatever in the record to shew any injunction by any person, much less to shew for what causes an injunction was sued out, or that it was abandoned.

The motion to dismiss is denied.



## State vs. Tennant.

It is objected that the offence mentioned in the bond, 'shooting with intent to kill', is not the offence of which the parties were indicted, which was murder. The obligation of the bail bond is, that the prisoners shall appear and remain until discharged in due course of law, and their sureties are bound, though the indictment be for a different offence from that for which they were committed. *State v. Ridding*, 8 Annual, 79. The validity of a bail bond is not affected by the indictment being found for an offence of higher grade than that expressed in the bond, and which higher crime includes the lower. *State v. Cunningham*, 10 Annual, 393. Even if this latter quality be wanting, where the accused is bound not only to appear at court to answer a specific charge, but also not to depart thence without leave of the court first had and obtained, the bond, if violated, can be forfeited, and the securities held to its payment. *State v. Cole*, 12 Annual, 471.

It is also objected that the offence, described in the bond, is technically not a crime.

There is not required in a bail bond the same accurate verbal statement of an offence that is required in an indictment. *People v. Blankman*, 17 Wend. 252. It is sufficient, if in the bail bond it be substantially, though not technically set forth. The reasons that impel courts to require strict conformity to statutory or general rules for the structure of indictments, and for the description of crimes therein, do not apply to bonds, executed to enable accused persons to liberate themselves from imprisonment.

Judgment affirmed.

No. 6853.

HENRY RENSHAW VS. GEO. W. STAFFORD, EXECUTOR, ET AL.

The acknowledgment of a succession debt by the administrator of the succession suspends the prescription of the debt as long as the property of the succession remains in the hands of the administrator, under administration.

The owner and mortgagor of property sold for taxes, can not buy it in, and thus acquire a title to the prejudice of the mortgagee.

The mortgagee's rights on the property will remain in full force.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides. *Bowman*, judge *ad hoc*.

*Clarke, Bayne & Renshaw* and *Jas. G. White* for plaintiff and appellant.

*Robert P. Hunter* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff is the holder of four promissory notes of \$3375

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47	791
30	853
109	288

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Renshaw vs. Stafford.

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each, executed by the late L. A. Stafford, and secured by mortgage on the Edgefield plantation, in Rapides. The notes matured January 23d, February 23d, March 23d, and April 23d, 1861, and were duly presented to George W. Stafford, dative executor of deceased, and by him duly acknowledged as just claims against the estate of L. A. Stafford on 20th December, 1865. The mortgage has been kept in full force by re-inscriptions from time to time. This suit is brought to enforce the said notes and mortgage on the said plantation, and to annul, or have declared inoperative, a certain tax-sale thereof, made December 13, 1875, to Mrs. Sarah C. Stafford, the widow in community of L. A. Stafford, and certain sales of portions thereof by her to other parties; also to enjoin the tax-collector and Auditor from making or completing said sale to her. The executor and Mrs. Stafford pleaded a general denial and the prescription of five, and in this court, of ten years. The other defendants file a general denial.

As stated, these notes were formally presented to and acknowledged by the dative executor on 20th December, 1865. The present proceeding was commenced May 16, 1876. George W. Stafford qualified as dative executor of the estate of L. A. Stafford 2d October, 1865.

Between these dates no judicial proceedings were had upon these claims. The estate continued in the hands and under the control of the dative executor, who seems to have rendered no account of his administration, or done any other act looking to a settlement of its affairs. In November, 1875, the whole plantation was adjudicated to the State for several years delinquent taxes, which with the penalties were permitted to accumulate to amount of some \$4000. The collector thereupon conveyed or sought to convey it, under act 105 of 1874, to Mrs. Stafford under circumstances hereafter to be stated.

The first question to be determined is that of the prescription of plaintiff's debt; for if it be prescribed he is without interest to contest the sale to Mrs. Stafford or its effects.

We premise by stating that we do not consider the question as any longer an open one, as to the five-year prescription. It does not apply to a case like this. See 12 R. 507; 29 A. 495. We propose therefore to discuss the following questions:

First—Is the claim of plaintiff barred by the prescription of ten years? and,

Second—If so, from what date or event does that prescription begin to run?

It may, we think, be conceded that the prescription of ten years is applicable to this debt, for it is one of that class denominated personal actions, which finds its prescription in the rule of art. 3544 C. C.

The real difficulty arises in determining the question when and in

what event does this prescription begin to run? Is it from the date of the presentation to and acknowledgment by the administrator? Or is it from the time the administrator renders his first account without placing thereon the claim so acknowledged, or is it from the date of his final account? We confess that these questions are surrounded with many and grave difficulties, and that there are apparent conflicts in the adjudications bearing upon them. A safe rule under such circumstances is to resort to fundamental and original principles of the law, and ascertain which of the various theories best accords with these.

We think that the following proposition may be accepted as fundamental:

That an administrator or dative executor is an officer of the court, and primarily the representative of the creditors of the estate. The effect of an administration is to take the property of the deceased out of the custody and possession of his heirs and place it in the hands of a trustee for the benefit primarily of the creditors, to be by him administered under the supervision and control of the court. It is in its effects not dissimilar to a deposit in pledge for the security of the creditors of the estate. C. C. 2979 *et seq.* There is no philosophic reason for distinguishing the effects of such an administration from those which flow from the administration of the estates of insolvents in the hands of syndics. The objects and purposes of the law are the same in both cases, to wit, the preservation of the property and its distribution to those entitled to it. The methods of procedure are very similar, and in many respects identical. The only real difference in the two cases is that one appertains to the estate of a living, the other to that of a dead man; the surplus of the estate after paying its charges is delivered in the one case to the living debtor, in the other to the heirs of the debtor. It has been said by this court, 2 A. 925, that "the property of a succession is the common pledge of the creditors. That an administrator is the trustee of the creditors; his first duty is to them, and his imperative obligation is to watch over their interests."

In 3 A. p. 531, the court say: "The assets left by an insolvent are the common pledge of his creditors. That pledge continues as long as there are assets to be divided."

If the administrator and dative executor (for their relations to the creditors are the same, see 13 A. 581, 18 A. 63), are trustees for and of the creditors; if they are the judicial depositaries of the property of the estate, then it seems to follow that their possession is that of the creditors of whom they are the mandataries in some sort. It results further that the creditors are in possession through these trustees of the property and effects of the estate, which are their common pledge.

It is the well-settled jurisprudence of this State that possession by

the creditor himself, or by his mandatary, of the pledge securing his debt operates a suspension of prescription as long as that possession continues. See 1 R. 556; 8 R. 145; 11 R. 183.

As long therefore as the heirs of the deceased allow the property of his estate to remain in the custody of the administrator, the trustee of the creditors, the principle stated requires that prescription, at least and certainly so far as their debts bear upon the objects of the pledge, be suspended.

The operation of this rule is of course limited to those creditors whose claims have been duly "recognized" by the administrator, or by judgment of court; for, until recognized in one or the other way, they are not classed as creditors of the estate, to be paid concurrently therefrom. C. P. 987.

We think these views harmonize with the provisions of the Code of Practice. The 984th article of that Code provides that "no bearer of a claim for money against a succession, etc., shall commence an action against such succession before presenting his claim to the administrator." The art. 985 directs the mode of recognizing the claim if the administrator finds it just. Art. 986 provides that "if the executor or administrator have any objection to it and consequently refuse to approve it, the bearer of the claim may bring his action," etc. Art. 987 declares that the creditors, whose claims have been thus recognized (*i. e.* by acknowledgment or judgment), can only be paid concurrently, etc. Art. 988 provides for calling together these recognized creditors, when the administrator is ready to pay the debts. Art. 989 says that as these creditors "can only obtain payment after certain delays, interest shall be allowed on their debts," etc. By arts. 1053 and 1054, the administrator can not be required to pay other than certain privileged debts until after the expiration of three months, even if he have funds.

We think it manifest that the law never contemplated that a creditor whose debt has been formally acknowledged should bring a suit to establish his claim. The policy of the law discourages such proceeding; would punish it by inflicting the costs thereof on the creditor. True, the law gives him after a reasonable time, which may be a few or many, but never less than three months, according as property may be sold for cash or on credit, and according as other contingencies may happen, a right to compel the administrator to account. But if the theory of the defense is correct, such a proceeding by a judgment or acknowledged creditor would not prevent prescription running against them. For if a judicial demand interrupts prescription it would seem that it is only when the object of that demand is the establishment of the right of the creditor; whereas, a proceeding against an administrator for a sale of property or for an account would be one in execution of an established

right, rather than one in recognition of a disputed one. To illustrate, a creditor, on refusal of the administrator, proceeds by suit to obtain judicial recognition of his claim. Having obtained his judgment of recognition, he continuously for eleven years pursues the administrator to compel sales of property and accounts of administration. After ten years of pursuit the administrator, who is his trustee, turns upon him and says: "Your judgment is extinguished by ten years prescription; you have not cited me, and had your judgment revived." Would it not be a full answer for the creditor to say, "You are my trustee; you hold property in your hands, put there as a pledge for my debt; your possession is my possession, and no prescription has run or can run as long as the heirs or other owners leave the pledge in your custody?"

This was the view taken by this court in the case of *Succession of Romero*, 29 A. 495. It is also the doctrine held by our own courts in cases of "*Cessio Bonorum*," 11 R. 348; 1 A. 365; 12 R. 155; 3 A. 531.

We have seen that there is no substantial reason for distinguishing between the cases of administrations of insolvent estates and those of deceased persons. In fact, insolvent successions are directed to be administered as estates of insolvents. See C. C. 1172 *et seq.*

We are referred by the counsel of defendant to the decision of this court in *Succession of Dubreuil*, 12 R. 507, 516; and to that in *Sevier vs. Gordon*, 21 A. 373, as holding the doctrine that prescription begins to run against an acknowledged claim from the date of the acknowledgment. It is true that in the former case, on rehearing, this court so held, and that in the latter case the decision in 12 R. is referred to approvingly. On that rehearing Judge Simon, as the organ of the court, says: "We confess that the question presented is not a very clear one." We think that in the original opinion in that case the decision, rendered by Judge Morphy as the organ of the court, is more conformed to the general principles of the law than the conclusion reached on the rehearing. Judge Morphy says: "Although under our laws no executory judgment can be obtained against a succession, the creditors are not without the means of asserting their claims and taking the necessary steps to interrupt prescription. All demands for money may be presented to the administrator, to be acknowledged by him. If the debt is admitted to be a just one, he shall write on the evidence of it a declaration which he shall sign, stating that he has no objection to the payment of such claim, after which the debtor shall submit it to the judge that it may be ranked among the acknowledged debts of the succession. C. P. 984, 985. From the time that this is done, *which is equivalent to a judicial demand*, prescription; we apprehend, *must remain suspended*, as the creditor can do nothing more against the estate, except it be to coerce the administrator to a prompt settlement of the estate." The rehearing

was granted solely on the ground that this opinion seemed to rest upon a state of facts which did not exist, to wit, that after having been acknowledged the claim had been presented to the judge to be ranked. On the rehearing stress is laid upon the fact that it was not so presented to the judge to be ranked; and this is the ground upon which the court reversed its former decree. The whole case proceeds upon the hypothesis that had this formality been complied with, then the opinion delivered by Justice Morphy would have been correct. Now we think that after the claim has been "recognized" by the administrator, its validity as an acknowledged debt of the estate in no way depends upon its being "ranked" by the judge. This last formality touches not the question of existence or validity of the claim, but its "*rank*" or "classification" merely. This presentation to the judge is *ex parte*, and no time is fixed within which it is to be made. For aught that appears in the law, this presentation to the judge, for the purpose of ranking the claim, may well be done when the administrator presents his account. Indeed, it would seem to us that that would be the proper time, as it would then be done *in concursu* and contradictorily with the other creditors. In practice such is the mode.

We therefore conclude that after a creditor of an estate has had his claim duly acknowledged by the administrator the law does not contemplate any further proceeding on his part to establish it, as against the estate. That in principle the administrator is his trustee, and holds in possession, for his benefit, the property of the estate, which is the common pledge of the creditors. That the creditor is not obliged to inaugurate judicial proceedings to preserve his right whilst this state of facts continues; and until an account is rendered ignoring his claim, or the possession of the administrator terminates, prescription is suspended. We think, therefore, that the plea of prescription is not well founded.

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#### ON THE MERITS.

George W. Stafford, the executor, is the son of L. A. Stafford, deceased, and of Mrs. Sarah C. Stafford, his widow, who has accepted the community.

It seems that the executor and the family of the deceased resided upon and enjoyed the fruits and revenues of the Edgefield plantation from 1865 to 1875, but failed and neglected to pay the taxes thereon, which accumulated until they amounted, in November, 1875, to some \$4000, when the property was advertised for sale to pay the same. The plaintiff went from New Orleans to Alexandria to attend this sale, and protect his interests as a mortgage creditor. At that offering the

## Renshaw vs. Stafford.

property was put up in lots, and some lots were adjudicated to plaintiff, and some to George W. Stafford; together sufficient to cover the taxes. Stafford declined to comply with his bids, and the collector, upon that as a pretext, refused to make a deed to plaintiff for the lots he had bought, and announced that he would re-advertise the property for sale. On November 29, 1875, the property was again offered, and adjudicated to the State, for the taxes. On December 3, following, plaintiff deposited \$4000 with the Fiscal Agent of the State, payable to the tax-collector of Rapides, and procured a letter from the Auditor advising the collector of said deposit, as "given to cover the purchase from the State of the lands" in question, and requesting the collector to make title to plaintiff. It is not disputed that the collector received these notices before he had made any conveyance to Mrs. Stafford. The collector in his testimony says: "I had received the Auditor's letters of December 3 and 13, 1875, before the title was made to Mrs. Stafford. *This whole business was done with and through George W. Stafford, and I never met Mrs. Stafford in the transaction, nor had I any conversation with her at all.*"

To our minds Mrs. Stafford was the mere *alter ego* of George W. Stafford in these transactions. Good conscience forbids that the executor and widow in community of the deceased, under the circumstances of this case, should be permitted to take advantage of their own wrong, and thus deprive creditors of the estate of its effects. It was the duty of the executor, as, also, of the widow in community—they were under both a legal and moral obligation—to keep down these taxes, and to preserve the property for the creditors. Mrs. Stafford was herself *personally bound*, as widow in community, for one half of these taxes and one half of these debts. The transaction can only be regarded and treated as a payment of the taxes, a redemption of the property for the benefit of the estate of L. A. Stafford.

Cooley on Taxation, p. 345, 346, says:

"Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers. \* \* So the mortgagor, remaining in possession of the land, owes it to the mortgagee to keep down the taxes, and the law would justly be chargeable with connivance at fraud and dishonesty if a mortgagor might allow the taxes to become delinquent, and then discharge them by a purchase which would at the same time cut off his mortgage. There is a general principle applicable to such cases, that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by a neglect of the duty which he owed to such party. The principle is universal, and is so entirely reasonable as scarcely to need the support of authority. Show the exist-

ence of the duty and the disqualification is made out in every instance."

In 11 Ill. p. 383, the court say:

"It would be inequitable to allow Shaw, after mortgaging the lands, to suffer them to be sold for taxes, and by buying them in himself defeat the lien of the mortgage. His purchase of the lands at a tax-sale, under such circumstances, must be regarded in the light of a payment of the taxes by him."

22 Maine 334: "It was, moreover, the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid, and by neglecting it, and thereby subjecting the estate to a sale, he committed a wrong against the reversioners. And when he received a release of the title, if any were acquired under that sale, he would be considered as intending to discharge his duty by relieving the estate from that incumbrance. To neglect to pay the taxes for the purpose of causing a sale of the estate to enable him to destroy the rights of the reversioners would have been to commit a fraud upon their rights. This is not to be presumed. On the contrary, he must be presumed to have intended by procuring that release to extinguish the title under that sale."

25 Cal. 45: "*If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly.*"

42 Maine 244, *et seq.*, was a case as follows: A, for a valuable consideration, agreed to convey to B certain premises within two years, provided B paid a stipulated sum of money within that time to A, and, also, all taxes that might be levied on the premises, and an agreed sum annually for rent. B failed to perform the conditions, allowed the property to be sold for taxes, purchased the tax title, and defended against A by force of that title. The court held: "It was the duty of the tenant to pay the taxes upon the demanded premises. The omission to do so was a violation of good faith and a breach of the condition on which he occupied them. To permit him to set up a title which he has obtained by a violation of his own duty, if it were in other respects good, would be most manifestly inequitable, and in fraud of the rights of the demandant. Such a defense can not prevail, either in law or in equity, and it requires no small degree of assurance to set it up in a court of justice."

The judgment appealed from is erroneous, and it is ordered,



## Renshaw vs. Stafford.

adjudged, and decreed that the same be and is hereby annulled, avoided, and reversed; and, proceeding to render such judgment as should have been rendered, it is now ordered, adjudged, and decreed that the plaintiff, Henry Renshaw, have judgment against the estate of Leroy A. Stafford, deceased, represented by George W. Stafford, executor, for the sum of \$13,500, with eight per cent interest on \$3375 thereof, from January 23, 1861, and like rate on like sum thereof from February 23, 1861, and like rate on like sum thereof from March 23, 1861, and like rate on the balance thereof from April 23, 1861, till paid.

It is further ordered and decreed that the special mortgage, as claimed and set forth in plaintiff's petition, and in the act of mortgage by Leroy A. Stafford to West, Renshaw & Cammack, of date April 6, 1859, be and the same is recognized and made executory upon the property therein described to pay this judgment, and that said mortgaged property be seized and sold according to law for that purpose.

It is further ordered and decreed that the injunction prayed for by plaintiff be made perpetual against the defendants herein, and that the tax-sales referred to in plaintiff's petition, whereby Mrs. Sarah C. Stafford claims said property, as well as the transfers made by her to James Moore and Charles E. Jonette, be and they are each and all declared inoperative, null, and void as against the plaintiff in this suit.

It is further ordered that appellees pay all costs of this suit in the court below and of this court.

The Chief Justice takes no part in this opinion.

No. 6937.

THE STATE EX REL. T. WHARTON COLLENS VS. ALLEN JUMEL, AUDITOR.

One who has a claim against the State for a salary, or for money due on other accounts, is entitled to have his right to payment adjudicated by means of a mandamus against the auditing officer.

In order to maintain the plea of *res adjudicata* there must be an identity of parties, of capacity, of object, and of cause of action.

When a judge has acquired his office, in the mode prescribed by the constitution, he has a vested right to its emoluments, during the term fixed by the constitution for its duration, and his right can not be impaired by an act of Legislature, passed during said term, abolishing the office.

The Auditor can not be compelled to warrant on the Treasurer in favor of any officer of the State, for any sum beyond the appropriation made by the Legislature for such officer.

**A** PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

*E. Howard McCaleb* and *E. H. Farrar* for plaintiff and appellee.

*James C. Egan*, Assistant Attorney General, for defendant.

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47	1086
30	861
108	606
30	861
111	187

The opinion of the court was delivered by

MANNING, C. J. The relator was re-elected Judge of the seventh district court of Orleans parish in November 1872, and was commissioned, and qualified thereunder.

On December 11th. of that year, an act was passed by the legislature abolishing the seventh and eighth district courts of that parish, and providing for the transfer of the records of those courts to other courts named therein, and also creating a new court to be called the Superior district court. Acts 1873, p. 38.

Judge Collens continued to perform the duties of his office until the records of his court were taken away, the clerk was dispossessed of his place, and the court room was occupied by the Fourth court, to which it had been assigned. After that, he held himself in readiness to perform its duties, and refrained from resuming the practice of his profession for two years or more.

In April 1873, the relator applied for and obtained a mandamus to compel the Auditor to warrant on the State Treasury for the two quarters of his salary ending respectively Dec. 31, 1872 and March 31, 1873. The first of these quarters commenced Oct. 1, 1872, at which time Judge Collens was serving under his election and commission of 1868. That case was carried to the Supreme Court, and our immediate predecessors held that he was entitled to his salary up to the promulgation of the Act of December 1872, which abolished his court, and was not entitled to any salary thereafter. *Collens v. Clinton*, 26 Annual, 406.

The present suit does not embrace a claim for salary for the period included in that suit, but seeks to enforce the right to salary from April 1, 1873, to November 1876, the end of the term for which the relator was elected and commissioned.

The respondent pleads the exception of *res adjudicata*, basing the plea upon the prior suit, and in case it should be overruled answers by a general denial, and with the special averment that there is no appropriation for the payment of the relator's salary. There was judgment for the relator, and the respondent appeals.

As to this last objection the respondent is in error, since it appears that the general appropriation bills for 1873 and 1874, each contain an appropriation of one hundred and twenty-five thousand dollars for the salary of the District judges throughout the State, and refer specifically to the Act of 1868 as the one copied or renewed, at which time the Seventh court was one of those provided for, and besides contain an appropriation of five thousand dollars for the salary of the judge of the Superior district court. The general appropriation bills for 1875 and 1876 provide one hundred and thirty thousand dollars in lump for the same purpose. So far as these bills may be considered as a legislative inter-

pretation of the Act of Dec. 1872, they are an indication that the General Assembly treated the salary as being due the relator.

There are two questions in this case,

1. can the relator sue to recover his salary in this form of action,
2. is his former suit a bar to the present.

The State is a sovereign, and can not be sued by her citizens, in her own courts, without her permission, but a civil proceeding, by which one officer of the State seeks to compel another officer of the same State to perform a ministerial duty, is not, in the proper sense of the words, a suit against the State. Nothing is more common than for a party who has a claim against the State, whether for salary as an officer, or for money due on other accounts, to have his right to payment adjudicated through and by means of a mandamus against the auditing officer. It is recognized by us continually as a legitimate mode of ascertaining what are the rights of persons who have, or who prefer, claims against the State. And to say, that none but an officer of the State can lawfully claim a salary from her, and that the relator can not claim it because his office is abolished, would be to assume in the outset as established, the very thing which is the gist of the controversy.

The plea of *res adjudicata* is not tenable. To sustain that plea, there must be an identity of parties, of capacity, of object, and of cause of action. One of these at least is lacking here. Marcadé says ;—*La cause, qui doit être la même dans les deux demandes que pour la seconde soit écartée comme déjà jugée, c'est le principe qui engendre immédiatement le droit qu'une partie prétend exercer et que l'autre lui conteste* \* \* \* du reste, *l'objet se trouve par la réponse à cette question ; que demande le plaideur ? et on trouve la cause par la réponse à cette autre question ; sur quoi le plaideur fonde-t-il immédiatement sa prétention ?* Explication du Code Napoleon, tome 5. p. 172.

The relator has carefully excluded from his present demand the salary for the two quarters, which formed the object of the demand in the first suit, and upon which there was an adjudication. It seems more probable that, on the part of the respondent, a plea has been confounded with a principle, and that in pleading the judgment in the previous case as an estoppel, he meant rather that the principle or ruling made by this court, as then constituted, was conclusive of the right of the relator, or his want of right, on the principle of *stare decisis*.

That principle is so deeply imbedded in jurisprudence that it is considered one of its fundamental rules, and is not to be departed from, except in those instances when a rigid adherence to it would be more detrimental than a disregard of it. A graver and more important principle lies behind that rule in this case. An unreasoning observance of it here would establish the doctrine that legislatures could control the

operation of the organic law when it prescribes the constitution of the judicial department of the government, and abolish constitutional offices at their own will. It is marvellous that the danger and the error of so radical a change in that system of checks and balances, which has so long been justly deemed the supreme excellence of our republican government, was not perceived.

The constitution has provided that in the parish of Orleans, the General Assembly may establish as many district courts as the public interests may require, and until otherwise provided there shall be seven—that the term of office of a district judge shall be four years, and his salary shall not be increased nor diminished during his term of office—that he, like all other officers, shall continue to discharge the duties of his office until his successor shall have been inducted, except only in cases of impeachment or suspension—and that he is liable to both of these for crimes and misdemeanors, and is also subject to removal for reasonable cause upon the address of two thirds of the elected members of the General Assembly.

When a judge has acquired his office in the mode designated by the constitution, he has a vested right to its emoluments during the term fixed by the constitution for its duration. The legislature can not deprive him of it. He may be impeded in the exercise of his judicial functions. He may be shorn of judicial power, and be deprived of the opportunity to discharge the duties imposed upon him by the acceptance of his office, but he can not be divested of the office except by one of the modes appointed by the constitution for that purpose, and he can not be denied his just demand of payment of the salary, which is prohibited from being increased or diminished during his term.

All devices tending to abrasion of the independence of the judiciary, or to subject it to legislative or popular caprice, have been uniformly condemned by the wisest men of our country. Numerous instances have occurred in the States of attempts by the legislatures to oust judges from their constitutional offices, and deprive them of their salaries, and in no instance has the doctrine announced in the relator's case in the twenty-sixth Annual found any favour. A case in Illinois meets the point exactly. Ballou was elected a judge of the circuit court, was commissioned and qualified, and two years afterwards and before the expiration of his term, the legislature repealed the act which created the circuit of which he was judge, and established another circuit in its stead. The court say ;—"The question is, can the legislature expel a circuit judge from his office by creating a new circuit, and taking from him the territory which constituted his circuit. The bare reading of the constitution must convince any one that it intended to prohibit such a proceeding. It was the intention of that instrument to place the

judges entirely above and beyond legislative control or interference, except by impeachment or address. It is the constitution which creates the office of circuit judge, and not the legislature. \* \* \* \* It is unnecessary now to say whether the legislature may reduce the number of judicial districts by abolishing one and attaching its territory to another. If it may, then the office would cease upon the expiration of the term of the judge, but until the expiration of his term, the constitution has not provided, nor has it authorized any mode of expelling him from his office." 23 Ill. 550.

The independence of the judicial department of the government is at once the anchor of our stability, the prop of our strength, and the shield of our defence. Its necessity was early felt—its importance instantly recognized. Said Mr. Hamilton;—"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals, from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. \* \* \* \* It is not to be inferred from the principle (that constitutions may be altered or abolished) that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body." No. 78 of the *Federalist*.

The relator is entitled to his salary for the term of his office, not included in his former suit, and the respondent should have audited his claim therefor to the extent of the appropriations, and drawn the warrants upon the Treasury in accordance therewith. We can not however make the mandamus peremptory so as to compel the Auditor to warrant for any sum beyond the appropriations for these officers. The extracts from the Auditor's books shew that there is a balance of the appropriation for each year unexpended, and that this balance is a different sum in each year, amounting to over thirteen thousand dollars in 1873, but to smaller sums in each of the subsequent years. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is amended by making the mandamus peremptory so far as to direct the Auditor to warrant on the Treasury in favor of the Relator to the extent only of one half of the unexpended balance for each year on

his books to the credit of the District Judges Fund, unless said balance exceeds the amount of the warrants to which he is entitled, in which case the Auditor shall warrant for only such sum as the salary of the Relator amounts to, and as amended, that it be affirmed, the relator to pay costs of appeal.

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DISSENTING OPINION.

DEBLANC, J. Relator was elected and qualified as the Judge of the 7th district court for the parish of Orleans. A short time after his election, the Legislature abolished the court over which he was then presiding.

In August 1877, he applied to the State Auditor for warrants on the Treasury, for the salary which he claims as Judge of that abolished court, from 1873 to 1876.

The Auditor refused to comply with relator's demand : he obtained a mandamus against that officer to compel him to grant it, and the mandamus was made peremptory.

In my humble opinion, this was a mistake.

If due at all, the claim urged by the Relator would be due—not for services actually rendered—but rather as damages for the arbitrary destruction of the office to which he had been elected, and the consequent deprivation of the emoluments to which—otherwise—he would have been entitled.

To allow his demand, we have to decide :

1. Whether the act by which the 7th Court has been abolished was constitutional.

2. If it was not, whether a State can be held liable in damages for the errors and injustices of a Legislature.

In this instance, we are called upon—not merely to coerce the performance of a pre-existing duty, not merely to enforce an acknowledged, an ascertained right, but to condemn the State on a suit brought—not against it—but in its name, to pay a disputed claim. This, I believe, we can not do on a proceeding directed against the Auditor alone.

Relator's counsel contends that—in 1873—the Legislature made an appropriation to pay the salary of the district judges, and that—considering its amount—said appropriation necessarily includes the salary of even the judges of the abolished courts. Had it been the intention of the Legislature to do so, it would certainly have qualified that appropriation, so as to leave no doubt in regard to its destination.

As to its amount, the salary of a district judge is fixed by the constitution, and—I admit—no act of the Legislature, no decree of any court can reduce, increase, or change that amount ; but—under the pe-

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Renshaw vs. Stafford.

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culiar circumstances which surround this exceptional case, is that salary due? It may be due; but that is a fact which should be judicially ascertained in an authorized action against the State.

High. Ext. Remedies, sect. 10; 27th A 430; 29th A 267, 850.

For these reasons, I respectfully dissent from the opinion and decree of the Court.

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No. 6720.

THE STATE VS. J. ZIORD ALIAS J. M. WARREN.

An indictment for larceny which describes the property stolen as "ninety dollars in paper currency of the United States of America," is sufficiently specific. The value of the property need not be alleged. In the absence of proof to the contrary, it will be presumed that a person convicted of crime was properly represented by counsel in the lower court.

**A** PPEAL from the First District Court, parish of Orleans. *Abell, J.*

*H. N. Ogden*, Attorney General, for the State.

*Simeon Belden* for defendant.

The opinion of the court was delivered by

SPENCER, J. Defendant was indicted and convicted of larceny. He appeals and assigns as error—

First—That the description of the thing stolen is insufficient, and no value is alleged. The information charges the larceny of "ninety dollars, in paper currency of the United States of America," and states no value thereof.

In an indictment for the larceny of bank notes it is necessary to aver the value; but not so of government coin or money, which are themselves value. See 1 Whart. sec. 361.

We think the charge is sufficiently specific in describing the thing stolen as "ninety dollars in paper currency of the United States of America."

The prosecution in such cases as this is not supposed to be in possession of, or to have access to, the thing stolen, so as to give a minute and particular description of it. To require such description would virtually defeat all prosecutions for the theft of money. It is sufficient that from the charge in the indictment and the description of the thing, it appears a crime has been committed, if the facts be true. See Whart. vol. 1, sec. 358.

It has been held sufficient to charge the larceny of so many dollars in "U. S. gold coin;" also, "in specie coin of the U. S.," without desig-

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State vs. Ziord alias Warren.

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nating the kind of coin, or the number or denomination of the pieces. Whart. vol. 1, sec. 363.

Second—It is assigned, also, as error, that the record does not show affirmatively that the accused had counsel. But it does appear that witnesses were sworn and examined in his behalf, and that counsel moved for an appeal.

In the absence of proof to the contrary, we must presume that the court *a qua* did its duty in this regard. A party has the right, the privilege, of being heard by himself or counsel, but is not obliged to have counsel. He may prefer to defend his own cause. It is the duty of the court, if the accused desires counsel and is unable to employ one, to assign one to him; but we know no law or reason requiring the facts in this regard to appear as part of the record. Besides, if the party was improperly denied counsel on trial, it should have been made to appear by motion for new trial.

The judgment and sentence appealed from are affirmed.

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No. 6898.

PIKE, BROTHER & CO. vs. HART & HÉBERT.

The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said note on their individual property, in favor of the firm, and any third person acquiring the note from the firm, in good faith, for value, and before maturity, may enforce its payment.

**A**PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

*Saml. P. Greves and Lamon & Favrot* for defendants and appellants.

*Thos. B. Dupree and Herron & Bird* for plaintiffs.

The opinion of the court was delivered by

EGAN, J. This case was before us at the last term on an injunction against executory proceedings; see 29 A. 262. It now comes up on appeal from a judgment rendered *via ordinaria*, to which the form of action was changed subsequent to our decree.

The plaintiffs' claim is for judgment and recognition of mortgage, as holders before maturity of a note secured by mortgage, given under the following circumstances:

On the twenty-sixth of November, 1873, S. M. Hart and F. E. Hébert, individually, executed their promissory note, payable to the order of Hart & Hébert, a commercial firm composed of themselves. The payment of the note was secured by mortgage in favor of the said commer-



dial partnership or any future holder of the same, on property of which S. M. Hart and F. E. Hébert, individually, were joint owners.

The mortgage contained the pact *de non alienando*. The firm subsequently failed, and transferred the mortgaged property with other assets to liquidators for the benefit and account of their creditors. The liquidators, claiming to be third possessors, intervened, and set up that the plaintiffs had no mortgage. That if any ever existed it was extinguished by confusion and compensation. The ground taken is that S. M. Hart and F. E. Hébert, the mortgagors, being the same persons who composed the firm of Hart & Hébert, in whose favor the note and mortgage were executed, they were at once the owners of the property and of the mortgage and note which it was intended to secure. In other words, that they were at one and the same time both mortgagors and mortgagees, and makers and payees of the note. That one can not make a mortgage in his own favor, but only of another, under article 3290 of the Civil Code, and that thus the extinguishment and confusion pleaded took place. C. C. 3374. It is hardly necessary to say that if there were that identity argued for by the counsel for the intervenors, it could not affect the notes which would then be simply payable to their own order, and when indorsed to third persons be exigible by them. This, however, is not contended. It is, however, true to say that "the ideal thing," the partnership, is perfectly distinct from the individuals who compose it; and may have, indeed, always does have properties, rights, and obligations equally distinct, and which the law so recognizes. This is elementary. Our own C. C., article 2856, says: "Every partner owes to the partnership all that he has promised to bring into the same." Article 2857: That, in case of eviction of a thing promised to be brought into the partnership, he is bound in the same manner as a seller toward the purchaser who buys from him. Article 2858: That he owes interest on sums promised to be put in the partnership from the day he was bound to pay the same; and so, also, on moneys taken out of the funds of the partnership; so, also, by the next article, 2859, does he owe the profits made by his skill or industry or credit when he agrees to furnish them, while, on the other hand, he is a creditor of the partnership for any sums paid for its account and obligations, as well as losses incurred for its benefit. C. C. 2864. In view of these provisions, the fallacy of the argument is manifest, for if there may be a principal obligation of the partners toward the partnership, then may it likewise have its accessory security, the mortgage, as well. There is nothing in the law to prohibit it, and it is of common occurrence, either to make up the original capital, or to raise funds for the use of the partnership; and this may be done by one or all of the partners. The argument of intervenors' counsel proves too much, for, if carried out, it would result

in the inevitable conclusion that though the title to the mortgaged property, and of all their other property, was in the name of the individuals, it belonged to the partnership, because it belonged to the individual partners. This is not true of any property, and it has been often held that land even acquired in the name of a commercial firm belongs not to it, but to the individual members, and is not even liable to be first discussed by partnership creditors. See *Poydras vs. Laurens*, 6 A. 771; *Stillman vs. Purnell*, 3 L. 497; *Weid vs. Peters*, 1 A. 432. But, were it otherwise, it was competent for either or both the partners not only to execute notes, but, also, to give mortgages to secure them in the hands of any future holder, or to secure debts having no legal existence at the date of the mortgage. C. C. 3292, 3293; 7 A. 297; 18 A. 234; 21 A. 668; 22 A. 286.

We recently held, in the case of *Billgery vs. Ferguson*, see 30 A. p. 84, that a mortgage, if even given without any consideration, arising between the parties at the time, but on its face to secure certain promissory notes named therein, which subsequently passed into the hands of a third *bona fide* holder, was enforceable in law at the instance of such holder, and for his benefit.

In the present case the note sued on did so pass before maturity, and there is nothing to question the good faith, either of the makers or of the holders, nor is it in any manner shown, or even pleaded, as it was in the *Billgery* case, that the transaction was simulated or unreal. On the contrary, there is every thing to support the reality and legality of both note and mortgage. Indeed, it is in evidence that another note of the same class and amount, secured by the same mortgage, had been actually paid. The intervenors claim to be third possessors, but are not under the evidence entitled to occupy even that position, as they are shown to be and allege themselves simply liquidators of Hart & Hébert, and in that capacity to have received from the partners a transfer of the land mortgaged for the benefit of creditors. This is at best but a security and means for the payment of the debts, coupled with the power to sell the property for that purpose, the real title being still in the hands of the debtors. This, however, is immaterial, as we have already seen that the mortgage contains the pact *de non alienando*, which entitles the mortgagee to proceed directly against the property, without resort to the delays and formalities of an hypothecary action.

The judgment appealed from is correct, and is affirmed. It is further ordered that the appellants pay the costs of appeal.

No. 6789.

## WORKINGMEN'S BANK VS. BLAISE LANNES ET AL.

In a suit to annul a tax sale of real estate made by a State tax collector, the State is not a necessary party.

Act No. 7, passed by the Legislature at its extra session, May 1875, postponed the payment of all taxes then due the State until the first of November, and any sale of lands made by a State tax collector between the passage of said act, and the first of November, 1875, on account of delinquent taxes, is null and void.

Before a valid sale of real estate can be made by a State tax collector, on account of unpaid taxes, it is necessary that the owner of the real estate should have had ten days written or printed notice to pay the accrued taxes.

Any absolute nullities in a tax sale of property may be set up, and availed of by the creditors of the owner.

A tax sale of property assessed in the name, and for the taxes of one person, which belongs to another; or made under a seizure recorded as against one not the owner; or made under an advertisement describing it as the property of one not the owner is illegal and void.

In forced alienations without legal process, all the formalities prescribed must be observed, under pain of nullity.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Hornor & Benedict* and *F. W. Baker* for plaintiff and appellee.

*R. King Cutler* and *Horace C. Upton* for defendants and appellants.

The opinion of the court was delivered by

**MARR, J.** The Workingmen's Bank proceeded *via executiva* on certain notes of Blaise Lannes, representing the credit portion of the price of two lots of ground, sold by Martin Lannes to his brother Blaise, in October, 1873, secured by vendor's mortgage on the property. Pierre Lannes enjoined the sale, claiming to be the owner of the two lots, in virtue of the sale and conveyance made to him by the tax collector, in August, 1875, and the deed subsequently made to him by the Auditor of Public Accounts, for the taxes of 1873, due by Martin Lannes.

The bank, in answer to this injunction suit, alleged the nullity of the tax sale. The district court decided that the title conveyed to Pierre Lannes could not be attacked otherwise than by direct action, and perpetuated the injunction, reserving to the bank the right to proceed by direct action; and this judgment was affirmed on appeal. 29 An. 112.

The bank then brought this suit against Blaise Lannes and Pierre Lannes, alleging the nullity of the tax sale; and praying to have it declared void, and for judgment against Blaise Lannes, for the amount of the mortgage debt, with recognition of the right of vendor's mortgage on the property.

Defendants excepted that the title of Pierre Lannes could not be disturbed without making the State, his vendor, a party; that the allegations of the petition are too vague to enable defendants to answer until

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30	871
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plaintiff's cause of action is set forth with more certainty; and that the petition discloses no cause of action.

These exceptions were properly overruled. The State can not be sued except with its consent, specially granted. The allegations of the petition, the claims of plaintiff, and the causes of nullity, are set forth in very clear and distinct terms; and, if true, they show perfect cause of action.

Defendants then plead the general issue; and the judgment of the court, from which they have appealed, declared the nullity of the title of Pierre Lannes; and condemned Blaise Lannes to pay the mortgage debt, as prayed for in the petition, reserving to Pierre Lannes the right to claim such sums as he may have legally paid for taxes on the property.

Eight causes of nullity are set out in the petition:

First—That the tax sale was made in violation of the laws of the State, and particularly act No. 7 of the extra session of 1875.

Second—That the property was not assessed according to law, neither the name of the owner nor the proper description being given.

Third—That demand and notice to pay the taxes was never given according to law.

Fourth—That no legal seizure was ever made, no legal notice of seizure, no legal recordation of seizure caused to be made.

Fifth—That the owner of the property owned personal property liable to seizure of sufficient value to pay the taxes.

Sixth—That no legal advertisement of the sale of the property was made.

Seventh—That no legal deed or act of sale was ever passed, executed, or recorded.

Eighth—That no money was paid by Pierre Lannes; that the sale was fraudulent, made at the instance of Blaise Lannes, to defraud petitioner; and Blaise Lannes is now and always has been the true owner, notwithstanding said pretended sale.

The act of 1875, p. 106, is entitled "an act to relieve delinquent taxpayers from the payment of penalties in certain cases." The first and second sections relate exclusively to taxes due on lands overflowed during the flood of 1874; and the delinquents are relieved of all penalties, *provided* the past due taxes are paid on or before the first of December, 1875. The third section declares that "upon payment of the principal or the amount of the tax itself on or before the first of November, 1875, all interests and penalties thereon shall be remitted on all taxes due throughout the State."

The last clause of section one declares "that the provisions of this act shall apply only to taxes due on lands overflowed during the flood

of 1874." Construed strictly, this would make the third section nugatory; but the third section is a later expression of the legislative will. The statute is remedial; and it must be liberally interpreted, and in such manner as to give effect to the whole. Day of grace is given to the first of December, 1875, only to those owing taxes on lands overflowed in 1874, on their complying with the requirements of section two, stating under oath that the lands were overflowed, and that they were unable to derive revenue from them sufficient to support themselves and families, and to pay the taxes due.

Section three is broader; and it covers delinquents throughout the State; the only difference being that delay is given them to the first of November, one month less than to the sufferers by the flood; and they are not required to make oath or to do any thing else except to pay the amount of the tax itself, without interest or penalty, on or before the first day of November, 1875.

Section four repeals all contrary or inconsistent laws, and gives effect to the act from its passage, May, 1875. Certainly any law which authorized or enabled a tax collector to compel the payment of taxes due at the date of this act, by any means or process, before the first of November, 1875, would have been not only inconsistent with the act of May, 1875, but would have left the tax payer at the mercy of the tax collector, the will of the Legislature to the contrary notwithstanding.

Act No. 47 of 1873, section one, authorized tax collectors, after the public notice required by law, to give ten days written or printed notice to the owner to pay the tax assessed on his property, after which delay, if the tax was not paid, the tax collector might seize the property, by recording a description of it, with the amount due, in the mortgage book of the parish, and on the fourth day of such recordation "shall proceed to sell said property, without legal process, after advertising three times, within ten days, in the official journal. *Provided*, that when personal property sufficient in amount is found to satisfy the State's claim against such tax payer, the same shall be seized to satisfy such claim in preference to real estate."

It was under this statute that the tax collector in the Sixth Municipal District sold the property in question, on the fourth of August, 1875.

There is nothing in the deed or the record to show that any written or printed notice to pay the tax was ever given to the owner, or agent of the owner of this property, or to any other person whomsoever.

On the twelfth July, 1875, an entry was made in the mortgage book of the parish of Orleans, beginning "By virtue of a writ of seizure and sale issued by John Garstcamp, tax collector, \* \* \* in obedience to section one of act No. 47, \* \* \* the said tax collector has seized and taken into his possession the following described property to pay and

satisfy the amount enumerated and due by the owner thereof for State taxes for the year 1873, to wit:

2129.—Martin Lenas.	{	Lots Nos. 5 and 6, square No. 13, bounded by Tchoupitoulas, Jersey, Marengo, and Milan streets, measuring sixty feet front on Tchoupitoulas by a depth of 117 feet."
Cancelled August 6, 1875,		
J. M. Conway,		
Deputy Rec.		

Next follows the advertisement in the official journal of twenty-seventh July, third, fourth August:

"Tax Collector's Sale, No. 2129. \* \* \* State of Louisiana vs. two lots of ground, fronting on Tchoupitoulas street, in square No. 113, assessed in the name of Martin Lenas." \* \* \* "I will proceed to sell at public auction, at my office, No. — Berlin street, in the Sixth District, \* \* \* on August 4, 1875, \* \* \* for taxes of 1873, amounting to \$40 60, together with all costs, penalties, and charges. At said sale the property will not be adjudicated unless the bid is for a sufficient amount to satisfy the aforesaid claim, together with the penalties thereon, and all costs and charges which may have accrued. The purchaser at this sale will be put in immediate possession."

The next is the tax collector's deed, dated fifth August, 1875, reciting the sale and adjudication to Pierre Lannes, for the taxes due by Martin Lenas, for the price of \$110 cash, of which \$58 85 were applied to the taxes, costs, and charges, and \$51 15 remained in the hands of the tax collector as "overplus," to use his word; and on the fourteenth February, 1876, the Auditor of Public Accounts conveyed the property to Pierre Lannes. In this deed it is stated that the property had belonged to Martin Lannes, in whose name it was assessed for the taxes of 1873; and the Auditor conveys to Pierre Lannes all the right, title, and interest of Martin Lannes in and to the property.

And this is the title which Pierre Lannes sets up and relies upon against the creditors of his brother having vendor's mortgage on the property for four fifths of the purchase price.

We do not think it necessary to proceed further in the investigation of this case. It exhibits an outrageous violation of the right of property by the tax collector; a bold defiance of the remedial act of 1875, which Blaise Lannes would hardly have submitted to if his mortgage notes for the price had been paid.

The sale on the fourth of August, 1875, for the taxes of 1873, was a nullity. It is to no purpose to say that Blaise Lannes, the owner, did not complain. His creditors have rights of which he can not deprive them; and when a title adverse to the claim set up by them is interposed, they may oppose the absolute nullities of that title, even if he should prefer to waive them in favor of his brother. The tax collector was divested by the act of 1875 of all power to enforce the collection of

taxes by sale or otherwise before the expiration of the delay fixed by the Legislature, first November, 1875.

It would not have been lawful to sell property assessed in the name of Martin Lannes, belonging to Blaise Lannes, for taxes due by Martin Lenas; nor under a seizure recorded as against Martin Lenas, nor an advertisement describing it as the property of Martin Lenas; nor was it lawful for the Auditor to convey the property of Martin Lannes in confirmation of a sale and conveyance by the tax collector of the property of Martin Lenas. We do not think the tax collector could legally have made the sale at his office, especially under an advertisement which gave no other description of the place than "at my office, number Berlin street, Sixth District;" nor do we understand the act of 1873 as authorizing the sale by the tax collector without the previous ten days written or printed notice to the owner or his agent to pay the taxes.

In forced alienations, without legal process, all the formalities prescribed must be strictly observed under pain of nullity; and it must appear that all has been done that the law requires to authorize the sale, and to make it complete and perfect. It should be shown, in a case like this, by the recitals in the deed, if not otherwise, that the notices required by law had been given. Nothing would justify the tax collector in selling two lots of ground to pay the taxes when one would suffice; nor to retain the "overplus" resulting from an excessive sale.

Pierre Lannes knew that this property did not belong to Martin Lenas. The act of sale by Martin Lannes to Blaise Lannes was recorded on the day of its date, October 10, 1873; and the tax collector and Pierre Lannes, were, by operation of law, affected with notice and knowledge of the title as it stood upon the public records. The tax collector knew that the property had been assessed in the name of Martin Lannes; and the use of the fictitious name of Martin Lenas, in the recording of the seizure, and in the advertisements and the tax collector's deed, can not be attributed either to error or ignorance on the part of the tax collector or of Pierre Lannes. Perhaps it was designed, certainly it tended, to conceal the fact that the property of Blaise Lannes was about to be sold for the taxes of 1873, assessed against the former owner, Martin Lannes, and assumed by his vendee, Blaise Lannes.

After the six months allowed for the redemption had expired, when the Auditor made the final confirmative conveyance, he gave correctly the name of Martin Lannes as the person who was the owner against whom the assessment for the taxes of 1873 was made; and as the person whose property was seized and sold by the tax collector, on the fourth August, 1875, for the taxes so assessed, and purchased by Pierre Lannes; and this conveyance was not of property belonging to Martin Lenas,

the fictitious tax payer, but of "all the right, title, and interest which the said Martin Lannes has or had in or to the same."

The pretensions of Pierre Lannes have the support neither of good faith nor any equitable consideration whatsoever. They are equally unsupported by the law under which he claims; and the judge of the district court has done justice between the parties on the issues made and submitted to him.

The judgment appealed from is therefore affirmed with costs.

No. 6039.

CITY OF NEW ORLEANS VS. THE MECHANICS' AND TRADERS' INSURANCE COMPANY.

The notes, bills, etc., representing the money loaned at interest by a corporation, constitutes a part of its property, and are liable to taxation.

**A**PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

*Saml. P. Blanc* for plaintiff and appellee.

*H. N. & O. N. Ogden* for defendants.

The opinion of the court was delivered by

SPENCER, J. This is a suit to recover of the defendant \$1846 25, taxes of 1875, on an assessment of "personal property," to wit: "merchandise, capital, and money at interest."

The defense relied upon in this court is, that "credits," "money at interest," are not *property* within the meaning and intent of article 118 of the Constitution, and that the Legislature has no authority to impose, therefore, a tax upon them.

The argument is, that to tax credits, promises to pay, notes, bills, etc., is double taxation. Thus, if A loans B one thousand dollars, and takes his note therefor, you tax the money *once* in B's hands, and the same money again in A's under the name of *credits*. It is argued that this process ultimates in the borrower paying a double tax; for it is said that the lender will increase his interest to the extent of the tax, and thereby throw upon the borrower eventually both taxes. If this be so, it might afford the borrower a strong argument for resisting *his* taxes, but we are at a loss to see why the lender should complain, since the theory is that he ultimately pays no tax at all—imposing his taxes on the debtor's shoulders. At all events, it is not pretended that the creditor pays two taxes. At most, he pays but once, and we do not see what mission he has to protect anybody but himself from wrongful taxation.



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City of New Orleans vs. Mechanics' and Traders' Insurance Company.

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Credits represent *value*; so much so that it is admitted that to the extent that a man is in debt, to the same extent his creditors may be said to have an eventual title to his property. Now the proposition is that this creditor class, who may in reality own thus, indirectly, the whole property of a State, shall pay nothing for the support of the government. It seems to us that this result is exceedingly inequitable, and that if anybody is to be exempted from taxation on the amount of these credits it should be the man who owes them, and whose property and possessions are diminished in value by the amount thereof.

The argument by which it is attempted to be shown that notes, bills, bonds, stocks, etc. are *not property* is too sublimated and metaphysical to be practical in matters of legislation. If they are not property, they represent value and produce revenue. But to say that our constitution forbids them to be considered as property, would be to expunge from our Codes provisions and principles that are as old as the civil law. See C. C. 474, 481, 483, 484, 491, 2642, 3155, and many others; C. P. 642, 676. They are classed as "things;" may be bought, sold, appraised, seized; and make up and constitute the wealthiest patrimonies in the world. Is it not rational, in seeking the meaning of the word "property" in the constitution of 1868, that we ascertain what has always been its acceptance in our law, in our jurisprudence, and by common usage? And when we ascertain that, from time immemorial, "incorporeal things" of the kind in question have been held and treated as embraced in the term "property," shall we turn our back on all this and run away after the metaphysical abstraction that "property is always and of necessity a physical actuality?"

It is our duty to interpret words in a statute "in their ordinary and usual signification," as they are "popularly used." C. C. 14.

We are referred to no authority for the proposition that notes, bonds, stocks, etc. are not property, except that of the Supreme Court of California in "The People vs. Hibernia Savings Society," lately delivered, and that of a writer in the Atlantic Monthly for September, 1877. These productions are certainly able and ingenious discussions of the abstract nature of property. But it is a full answer for us to say that we are here to interpret the laws of this State as the framers thereof intended and understood them; and we are tempted to say of this California decision what Mr. Walker in his work on "Taxation," p. 59, says of it: "We venture to affirm that the idea that these evidences of debt are not property in the legal acceptance of that term never before entered the brain of a lawyer."

But it seems to us that if it were conceded that these credits are not property, it would not follow that the Legislature could not tax them. The theory of our government is that a State Legislature may

do any thing which is *not prohibited* in the State or Federal constitutions. Now strip these "credits" of their title as "property," and you thereby make them *nondescripts*, and *there is no prohibition* in the constitution against taxing them "as credits" *ad libitum*, for it is only "property," "incomes," and "trades" the taxation of which is restricted by the constitution. We think it better and safer for capitalists that we adhere to the old landmarks, and treat them as "property holders," in duty bound to contribute, like other people, in proportion to their means and the protection accorded them, to the expenses of the government.

The judgment appealed from condemned the defendant to pay the amount claimed, with interest and costs, and it is affirmed.

## No. 6862.

## JOHN A. MORRIS VS. NEUVILLE BIENVENU ET AL.

One of the defendants in a suit in which a formal judgment has been rendered can not disturb that judgment either by an action of nullity, or by appeal, without making all parties to the proceeding who were parties to the original suit.

An action of nullity can not be maintained pending a suspensive appeal involving the same issues.

One who is a citizen of another State, although he have a dwelling here, and reside in it, for some months during each year, is nevertheless an "absentee" and hence, if he have no known representative here, may be legally represented in a suit brought against him by a curator *ad hoc*.

When an absentee is brought into court not by attachment, but by service of citation on a curator *ad hoc*, it is not necessary to post the citation on the door of the court-room.

It is only where a judgment for money has been enjoined that damages can be awarded on the dissolution of the injunction.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*B. R. Forman* for plaintiff and appellant.

*Chas. F. Claiborne* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This suit was brought to injoin, and to have declared null, the judgment in the suit of *Bienvenu v. Factors' and Traders' Insurance Company*, and others, *Morris*, appellant, which we have just disposed of on the motion to dismiss.

The petition charges that *Morris* is the owner, and has been in possession for some three years, of the property claimed by *Bienvenu* in the suit against the *Factors' and Traders' Insurance Company*, and others: that he is a citizen of the State of New York: that while preserving his citizenship in that State, where he has a summer residence, he has for six or more years past had a dwelling-house, and been a

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## Morris vs. Bienvenu.

housekeeper in the city of New Orleans, where he spends the winter; and that he is not an absentee within the meaning of the Codes, which authorize the fictitious citation through a curator *ad hoc*.

The petition goes on to state the bringing of the suit by Bienvenu, and his prayer that Morris be cited through a curator *ad hoc*, and judgment rendered against him for the ownership of the property; and it charges that, "your petitioner was not an absentee, but had a residence in New Orleans, and could not be brought into court by a curator *ad hoc*; that, in fact, no curator *ad hoc* was ever appointed; and that no citation was ever served by posting on the door of the room where the court is held, as required by law."

The defendant, Bienvenu, excepted on several grounds, one of which was that a suit to annul a judgment can not be maintained without making all those who were parties to the original suit parties to the suit in nullity; and another was that the action of nullity will not lie pending an appeal involving the alleged causes of nullity.

The judgment of the district court maintained the exceptions, and dismissed the suit, with \$250, in damages against plaintiff and his surety on the injunction bond *in solido*; and they appealed.

The original suit was an action of partition; and Morris was made a party because he claimed to be the owner of the property which Bienvenu claimed. The judgment decreed that the property belonged equally, *in indiviso*, to Marchand, the Factors' and Traders' Insurance Company, and Bienvenu; and it referred them to a notary to make the partition in kind. We do not think that Morris, a defendant in that suit, could disturb that judgment without making all the parties to it parties to the proceeding, whether by appeal, or by action of nullity.

We do not think an action of nullity can be maintained pending an appeal involving the same issues. Possibly there might be such a showing made, *prima facie*, of the absolute nullity of the judgment as would authorize the court in which it was rendered to suspend the execution by injunction pending an appeal not suspensive; but it would be the right of the appellee, thus enjoined, to have the reality and the sufficiency in law of the alleged causes of injunction determined summarily, on exception or motion to dissolve.

Counsel for appellee argues that there is no proof in the record that the value in dispute exceeds \$500; and, therefore, it is not shown that the case falls within the jurisdiction of this court. The description of the property, and the admission on the trial in the district court, that it is leased for \$30 a month, suffice to establish a value exceeding \$500.

The distinct grounds of nullity set up in the petition may be thus condensed and stated:

1. That plaintiff in injunction was not absent in the sense that the court was authorized to appoint a curator *ad hoc* to represent him.
2. That no curator *ad hoc* was appointed.
3. That no citation was served by posting on the door of the court-room.

*First.* The R. C. C., article 56, requires the judge before whom a suit is pending against an absentee who has no known agent in the State, etc., to appoint a curator *ad hoc* to defend him in the suit; and the R. C. P., article 116, requires the plaintiff who intends to institute a suit against a person who is absent and not represented in the State, to demand that a curator *ad hoc* be named to defend the suit. If, therefore, Morris was an "*absentee*," within the meaning of the Civil Code, or was "*absent*," in the sense of article 116 of the Code of Practice, he was in that condition which authorizes and requires the appointment of a curator *ad hoc*.

According to the Civil Code, article 3556, number 3: "An *absentee* is a person who has resided in the State, and has departed, without leaving any one to represent him.

"It means, also, the person who never was domiciliated in the State, and resides abroad."

By the Constitution of the United States, fourteenth amendment, all persons born or naturalized in the United States are citizens of the United States, and of the State wherein they reside; and by the Constitution of Louisiana, article 2, all persons born or naturalized in the United States, "and residents of this State for one year, are citizens of this State."

No one can claim the privileges of a citizen of two States at the same time. He may have dwelling-houses in two States, and he may occupy and keep house in them at different times; but he is a citizen of the State in which he resides; and he resides in the State of which he is a citizen, although he may absent himself temporarily. The allegations of the petition fix the legal residence of Morris in the State of New York; and the fact that he has had a dwelling-house, and been a housekeeper in New Orleans for six or more years past, where he spends the winter, is of no greater significance than if he had occupied apartments in a hotel or boarding-house during the winter.

In the sense of the Civil Code Morris was an absentee. He was a mere sojourner in New Orleans during the winter, and he was absent from the State whenever he was not actually present in it. It is not pretended that he was present in, nor was he residing in the State when the suit was brought; and in the motion for an appeal, by the curator *ad hoc*, in February, 1876, he is described as "a resident of New York." We entertain no doubt that his status was such as to authorize and

## Morris vs. Bienvenu.

require the appointment of a curator *ad hoc*, to defend the suit brought against him.

*Second.* In *Bienvenu v. Factors' and Traders' Insurance Company*, and others, we have sufficiently considered this ground; and we refer to the opinion just read in that case, in which we decided that Morris was legally represented by B. R. Forman, Esq., appointed by the court curator *ad hoc*, within the terms and meaning of the Codes.

*Third.* We attach no importance to the fact that citation was not posted. Where the property of an absent defendant is attached, the attachment and citation must be served "by affixing copies of the same on the door of the room where the court in which the suit is pending is held." R. C. P. article 254. By express law this formality is required in suits by attachment; but it is of so little real value, as notice to the absent defendant, that it can not be extended by implication to cases in which it is not specially required. *Cox v. Bradley*, 15 A. 529, and *Ticknor v. Calhoun*, 28 A. 258, relied on by appellant's counsel, were suits by attachment. In other cases, where an "advocate," or "attorney," or "curator *ad hoc*" is appointed, service is made by delivering to him in person, or by leaving at his domicile, a copy of the petition and citation. R. C. P. articles 195, 294, 737.

The district court erred in allowing damages against plaintiff and his surety in the injunction bond. It is only where a money judgment is enjoined that damages can be awarded on the dissolution, under the acts of 1831, 1832, re-enacted in 1855, p. 325; Rev. Stats. 1870, § 1754, 1755. In other cases, where damages can not be claimed in reconvention, under C. P. article 375, as amended by the act number 53, of 1839, sec. 7, the remedy is by suit on the bond. *Robinson v. Freret*, 9 A. 303.

It is therefore ordered, adjudged, and decreed that so much of the judgment appealed from as condemns appellants to pay two hundred and fifty dollars, damages and costs, be avoided and reversed; that the right of appellee to proceed on the injunction bond against appellants for damages be reserved; and that the said judgment be, in all other respects, affirmed; the costs of this appeal to be paid by appellee, and the costs of the district court by appellant, John A. Morris.

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No. 6587.

THE STATE VS. LEE JOHNSON ET AL.

The State must affirmatively show that the confession made by an accused was voluntary. A confession made by a prisoner under any promise of advantage to him, in consequence of it, must be rejected.

**A** PPEAL from the Superior Criminal Court, parish of Orleans. *Shaw*,  
J.

*H. N. Ogden*, Attorney General, for the State.

*Gabriel Santini* and *P. W. Kramer* for defendants.

The opinion of the court was delivered by

SPENCER, J. The only question presented by the defendants on this their appeal from a conviction of breaking and entering, etc., and grand larceny, is as to the admissibility of evidence of the confession made by one of them to an officer in charge.

The bill of exceptions, as prepared by defendant's counsel, recites that in answer to the question whether he had made any promises to the prisoner, by stating to him that he would be permitted to turn State's evidence, the officer replied, "I did." The district attorney adds that his recollection of the answer was that "he may have said to him that *he might be used as a State witness.*" The judge adds that his attention was not drawn to the officer's answer particularly at the time, and his recollection is not distinct, but thinks the district attorney's version is correct.

In our opinion either version suffices to show that the confession ought not to have been allowed to go to the jury.

The prosecution must show affirmatively that the confession was voluntary and not made under improper influences. *State vs. Nelson*, 3 An. 499. The words used by the officer clearly indicate a promise of advantage to the prisoner in consequence of his confession. *Archbold*, 7th ed. p. 413; *Wharton*, p. 686; *Boyd vs. State*, 2 Humph. 390. The evidence should have been excluded on the showing made.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and reversed, and that this cause be remanded as to all the defendants for a new trial according to law.

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No. 7028.

JOHN McCaffrey, Administrator, vs. Charles Cavanac, Administrator.

Under the present charter of the city of New Orleans the Common Council may lawfully assign to the Administrator of Commerce the superintendence, and management of the bridges across the navigable canals of said city.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Singleton & Browne* and *W. B. Lancaster* for plaintiff and appellant.

*Frank C. Zacharie* and *Samuel P. Blanc* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This is a controversy between the plaintiff as administrator of improvements and the defendant as administrator of commerce, under the city government, as to which of said officers has the

superintendence and management of the bridges across the navigable canals of the city of New Orleans. The city charter, section nine, provides:

"In the administration of the government and affairs of the city there shall be, in addition and subordinate to the executive powers of the mayor, seven separate departments, the heads of which shall be known as the administrators of said departments, and shall have the administration and control of the same, subject to the limitations imposed by this act, or other laws, or the ordinances and resolutions of the council, to wit:

"*First.* A finance department, etc.

"*Second.* A department of commerce, which shall have general superintendence of all matters relating to markets, railroads, canals, weights and measures, the fire department, and manufactories, and shall be vested with and perform such other functions and duties as may from time to time be prescribed by the council.

"*Fourth.* The department of improvements, which shall have general superintendence of all matters relating to the streets, sidewalks, pavements, and wharves, and to the construction, cleansing, and repair of the same, the construction and repair of bridges, and the drainage of the city, and shall be vested with and perform such other functions and duties as may be prescribed by the council." Acts of 1870, number seven, page 33-34.

On July 18, 1877, the city council adopted an ordinance reciting that:

"*Whereas*, under article two, of section nine of the charter, the administrator of commerce had general superintendence of all matters relating to canals, etc., resolved, that the administrator of improvements turn over and transfer to the administrator of commerce all canals and bridges over the New and Carondelet canals."

John McCaffrey brought the present suit to prevent and enjoin the execution of the above ordinance, alleging that the control, management, and superintendence of the bridges of this city, including the selection of employees to watch and tend the same, belonged to his department under the provisions of the charter above recited.

Cavanac, the defendant, answered by a general denial; averring the validity of the above ordinance, and that by virtue thereof, and by the terms of the charter, the superintendence of the bridges over navigable canals belonged to his department.

There was judgment for defendant, and dissolving the injunction. Plaintiff appeals.

Our opinion is that the charter is paramount to any ordinance of the city council. That where the charter is silent, or not prohibitory, "the ordinances and resolutions of the council" must govern.

McCaffrey, Administrator, vs. Cavanaugh, Administrator.

The language of the fourth clause of section nine of the charter gives the administrator of improvements, and seems to confine his powers to "the construction and repair of bridges;" which does not, by its terms or by necessary implication, embrace the *superintendence, management, or control* of such bridges, *after construction or repair*. This proposition gains strength when applied to *bridges over navigable canals*, since article *second* of section nine gives the administrator of commerce "superintendence of all matters relating to \* \* \* canals, etc."

We think there is nothing in the charter in conflict with this ordinance, and, therefore, that the matter is within the control and disposal of the council.

The judgment appealed from is affirmed with costs.

No. 6956.

THE STATE VS. WASHINGTON TAZWELL ET AL.

When the record in a criminal case shows that the grand jury came into court and presented an indictment in due form, it will be presumed, in the absence of specific objection and affirmative proof to the contrary, that the grand jury was properly organized.

The question whether a person tendered as a member of a petit jury sufficiently understands the English language to try the issues of a criminal case, is a question of fact confided exclusively to the decision of the lower court.

Being under the charge of larceny disqualifies a person from serving as a petit juror.

Because a confession of the accused to a prosecuting witness was made in response to a question put by the witness, the confession is not thereby rendered involuntary.

Where the indictment charges that an offense was committed at a certain hour of a certain night, it is sufficient to prove that it was committed at any hour during the alleged night.

It is not necessary, in order to convict one as accessory before the fact to the crime of burglary, to prove that the instrument he furnished his confederate to commit the offense with was actually used by the latter.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*H. N. Ogden, Attorney General, for the State.*

*John H. Dinkgrave for defendant.*

The opinion of the court was delivered by

SPENCER, J. Washington Tazwell and Wilson Kealey, as principals, and Zeke Hall, as accessory before the fact, were indicted and convicted of the burglary of a barn with intent to steal. Errors are assigned upon the face of the record, and a number of bills of exception were taken.



The assignment of errors is to the effect that the record does not show that a grand jury was ever empanelled for the November term, 1877; nor that the person signing the finding on the indictment as foreman was ever selected as such, or had authority so to sign. The record does show that on the thirtieth November, 1877, the grand jury came into court, and, all being present and answering to their names, presented, through their foreman, the indictment in this case; which indictment is endorsed: "A true bill. J. S. Murphy, foreman of the grand jury." The record does not show the names of the grand jurors, nor does it contain the entry on the minutes appointing the foreman; but commences with the "opening of court" on the day the indictment was presented. We do not consider it sacramental that these preliminary proceedings for the organization of the grand jury should be copied into the record. It is enough if it appears that the grand jury came into court and presented an indictment in due form. We will, then, in the absence of specific objection and affirmative proof to the contrary, presume that it was properly organized. The cases cited by defendants have reference to the petit jury organized to try the case. That jury is specially organized with reference to the particular case to be tried, and it might well be that its organization, etc., should appear by the record, but the same reason does not exist as to the grand jury's organization.

The first bill of exception is to taking the case up out of its order, and in violation of rule third of the court. That rule was as follows:

"There will be two calls of the docket. The first for the trial of cases by consent, and for fixing causes for a particular day. On the second call, all causes are set for trial in their order on the docket, *except preference and jury cases*, and such causes as may be assigned for a particular day, and each case when reached must be tried or otherwise disposed of."

This case was a "jury case," and by the very terms of the rule not embraced within the class "set for trial in their order on the docket."

The second bill of exceptions is taken to the ruling of the court on certain challenges for cause by the State of certain colored jurors. "The cause was that they did not sufficiently understand the English language;" they, having been asked, "Do you know what a verdict means?" answered, "No." The act of 1877, number declares the qualifications of jurors, and gives the judge, properly, much discretion in the matter of its organization, and we would be loth to interfere with it, unless it was manifestly exercised in an arbitrary manner. The question whether or not a juror sufficiently understands the English language is one of fact and not of law. We see no reason to doubt the power of the Legislature to fix the qualifications of jurors upon the basis of

intelligence or education, and if it do not discriminate on account of race or color, etc., it does not violate the Constitution of the State or of the United States. The law certainly does not require that jurors must be scholars, or even that they have any education; but it does require that they comprehend ordinary discourse in the English language, and wisely gives the judge power to determine this important fact, and we have no authority to review his decision thereon. No greater farce could be enacted than to try a man for his life or liberty by a jury who did not understand the meaning of the ordinary words of our language. The judge had the jurors before him, and had better opportunity of knowing this matter than we have, and even if we had the power to review we have no reason to believe that he abused the discretion the law vested in him.

Another juror was set aside because he was under a charge of larceny. A bill of exceptions was reserved, but we presume is abandoned, as it is not urged. At all events, the exception was not well taken.

The next bill is taken to the courts allowing the party whose barn had been entered to state that "he had lost corn prior to the date alleged in the indictment." It does not appear that the witness in any way connected or attempted to connect the accused with these previous takings. We do not see, therefore, that this statement was open to the objection that it was proving another and different offense from that charged. The next bill is to the same party being allowed, on re-direct examination by the State, to testify to a voluntary confession by one of the accused. The bill recites that it was objected to, first, because no question touching said declaration had been asked on the direct or cross-examination; and, second, because the declaration did not appear to have been voluntary, since it was made in response to witness's question whether "he (the accused) did not want to tell all he knew about stealing his (witness's) corn?" We can see nothing in this question calculated to render the declaration involuntary. As to the first objection *the court* says in *its addenda* to the bill that the objection made was "as to the voluntary character of the statement." Of course, we can only know the facts from the statements and certificate of the judge in the bill, and can not take the statements of counsel, except so far as they are agreed to by the judge.

The next bill of exceptions is taken to the refusal of the judge to charge, first, "That as the time at which this offense is said to have occurred is stated by dates (hours, days, months, and year), no evidence of a prior offense should be noticed by the jury."

Second. "That if there be no evidence to show that an instrument furnished by one accused as accessory before the fact was used for the purpose for which it was made, but another and different one is used to

commit the offense, that it has not been sufficiently proved to justify a verdict of guilty as accessory before the fact. That the instrument said in the indictment to have been furnished for the purpose of committing an offense must be proved to have been used for that purpose."

We think the court properly refused to give the first charge, for the reason that it was calculated to mislead the jury into the belief that the State must prove the very hour of the night charged in the indictment. Thus, under that charge, if the evidence had shown the offense to have been committed at eight o'clock p. m., instead of between "nine p. m. and five a. m." of the next day, as charged, it would have led the jury to believe it their duty to acquit. It was certainly sufficient to have proved the commission of the offense at any time during the night laid in the indictment, and such proof would not have been "of a prior offense," within legal intendment.

The second charge requested is manifestly wrong. It would be strange, indeed, if one who had so far counseled, aided, and abetted a burglary as to provide and furnish implements to effect it, could escape because when the burglar reached the place of his crime he found more convenient tools, and did not actually use those furnished him for the purpose by his confederate.

We see no error in the judgment and sentence, and they are affirmed.

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No. 6871.

30	887
46	255

#### SUCCESSION OF FRANCES PARKE BUTLER.

Testaments made in other States can not be carried into effect on property in this State, until registered in the court within whose jurisdiction the property is situated, and their execution ordered by the judge.

A foreign will, when duly authenticated, and admitted to probate at the testator's domicile, is entitled to be admitted to registry and execution in this State.

The executor of a foreign will is not permitted to exercise his office in Louisiana by virtue of his foreign appointment, but must first obtain the authority of the court here.

**A** PPEAL from the Parish Court of Iberville parish. *Crowell, J.*

*Favrot & Matthews* for Elliott Henderson, appellant.

*George Wailes* for administrator and appellee.

*Barrow & Pope* for intervenors and appellees.

The opinion of the court was delivered by

MANNING, C. J. Mrs. Butler died in July 1875 in Mississippi, where she was then, and for some time before had been, domiciled. Her olographic testament was duly probated in March ensuing, by and before

## Succession of Butler.

the proper court, upon the petition of Charles M. Conrad, the executor named therein, who however declined to qualify. At his request Elliott Henderson, a resident of Mississippi, applied for and obtained letters of administration *cum testamento annexo* from the local Chancery court, and qualified by giving the prescribed bond, and taking the official oath.

In July 1876, the suit now before us was commenced by an application of E. G. W. Butler, the surviving husband of the deceased, and A. H. Gay, to the parish court of Iberville, praying that the latter be appointed administrator of Mrs. Butler's succession. He is not an heir, and his application is not made as an alleged creditor. The motive of the husband in the selection would appear to be personal confidence. Legal notice of the application was given, and after expiration of the time for delay, no opposition having been made, Mr. Gay was appointed administrator and qualified, September 4, 1876. No mention is made in these proceedings thus far of the will of the deceased.

In April 1877, Elliott Henderson presented his petition to the Court of Iberville, setting forth that Mrs. Butler had left a will, which had been duly probated before the court of her last domicile, and of which he was the duly appointed and qualified administrator with the will annexed, in the stead of the executor named in the will—that the deceased owned property in Iberville parish which must be administered, and that Gay had been appointed administrator of her succession without any knowledge being imparted to the Court of the existence of a will—and praying that this appointment be annulled and revoked, and that he (Henderson) be appointed dative testamentary executor of the will, a copy of which, with all the proceedings of the Chancery court probating the same, was filed in the Iberville court.

Gay answered, that the will had not been probated, nor its execution ordered by any court of this State, and that it had no legal existence—that it was void for ambiguity and for provisions reprobated by law—and if not void, that he was the proper person to execute it.

Lawrence L. Butler, a son of the deceased, intervened and attacked the will as absolutely null.

Henderson then presented his petition in form to the Court praying the registry of the will, and an order for its due execution, which was made.

Finally, in August 1877, the husband of the deceased intervened, and prayed his appointment as dative testamentary executor, in the event that Gay's appointment as administrator should be set aside.

The trial was had on these pleadings, and resulted in the following judgment;

It is ordered by the Court that the will of Frances Parke Lewis be

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Succession of Butler.

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probated and recorded, and that the intervention of the forced heirs and Col. E. G. W. Butler be allowed, and that the administratorship of said succession be decided on the petitions of claimants before the Probate Court, and he who is most entitled by law shall receive the said administratorship, and that said administrator so recognized shall settle the said succession in accordance with the laws of the State of Louisiana.

The counsel of Gay and the Butlers, defendant and intervenors, insist that no appeal lies from this judgment, because it decides nothing except that no notice of Henderson's application had been given, and they move its dismissal. We see nothing in the record, and there is certainly nothing in the judgment, from which it may be inferred that want of notice was the point decided. On the other hand, the counsel of Henderson, the plaintiff, construe the judgment as annulling the will for the causes set forth in the interventions, and deferring the adjudication of the conflicting claims for the administration to an indefinite and future time.

It is not possible that this can be a correct interpretation of the judgment, since the will is ordered to be probated and recorded in express terms. The expression, that the interventions be 'allowed,' can not mean any thing more than that they are permitted to be filed, or their previous filing is approved, and the intervenors are 'allowed' to litigate in that form of pleading.

If this be a correct construction of the language of the judgment, the plaintiff has appealed from a decree in his favor, and the defendant and intervenors have moved the dismissal of the appeal, which if granted, would lose them their case. And yet the judgment, to our apprehension, can mean nothing else, if it be conceded that it means any thing.

We are not disposed to conclude the rights of parties in so grave, and to them interesting, a contestation because of a mistaken construction of the phraseology of a judgment, which is so vague and ambiguous as to admit a double doubt;—first, the customary and natural doubt of the defeated party whether the judgment is right; and second, the unusual and unnatural doubt of the successful party of the soundness of the judgment, ripening into such disbelief as to prompt an appeal for its reversal.

We shall therefore remand the case, and in doing so, it will be useful to all the parties to recall to their recollection certain established legal principles which are preliminarily connected with the main questions the lower court will have to solve.

Testaments made in other States, as this was, can not be carried into effect on property in this State, without being registered in the Court within the jurisdiction of which the property is situated, and the

execution thereof ordered by the judge. When the form has been observed of registering the testament, the fact of its having been duly probated at the domicile of the decedent being first established, as was done in this case, the order for its execution is granted as a matter of course. Civil Code, arts. 1681—2, new nos. 1688—9. The foreign will, when duly authenticated and admitted to probate at the testator's domicile, is entitled to be admitted to registry and execution here, even if the appointment of a dative testamentary executor is not asked. *Bermudez' case*, 13 La. 221. The object of the law is to give to foreign wills the same effect in this State, which they would have in the country in which they are executed, so far as concerns the form and effect of the probate. A court of probate can not therefore refuse to order the execution of a will made out of this State, if it be shewn to have been duly proved before the proper court having jurisdiction of that matter at the foreign domicile. *Robert's Suc.* 2 Rob. 427.

But the order of the Court for the registering of the will, and even for its execution, does not preclude interested parties from attacking its validity either in whole or in part. The intervenors can as well claim its nullity for the vices alleged by them, as for instance because it is said to contain a prohibited substitution, after the order for its registry and execution has been made, as before.

What person is entitled to appointment to execute the will is left an open question by the lower court, and as we have no authority or power in the premises, except to say whether he has conferred it upon the party legally entitled to it, after his appointment is made, it is only necessary to note here that the executor of a foreign will is not excluded from the appointment because of non-residence, neither is he entitled or permitted to exercise his office here by virtue of his foreign appointment, but must first obtain the authority of the court here. *Chiapella v. Couprey*, 8 La. 84. *Henderson v. Rost*, 15 Annual, 405. And if appointed, he must give security like an administrator, but whether an administrator with the will annexed, under appointment of a common law court, is entitled to the same privilege as a testamentary executor, may well be doubted.

The terminology in use at the common law, and here, must not induce the impression of a distinction between offices that does not exist. There is no such thing at common law as a court appointing an executor of a will. That office can only be conferred by a testator. If the executor named in the will dies, or will not act, the Court appoints an administrator as it does in cases of intestacy, only in the former, he is administrator with the will annexed. With us, he who is appointed to execute a will, whether by the testator or by the court, retains the same name in either case.

## Succession of Butler.

It is ordered and decreed that the judgment of the lower court is set aside, and the cause is remanded to try and determine two issues;

1. the validity or invalidity of the will, whether in whole or in part.
2. What person is entitled to the appointment as dative executor thereof.

And it is further ordered that the appellees pay the costs of appeal.

No. 6053.

JAMES SHARKEY, TUTOR, vs. LESLIE BANKSTON.

A suit instituted in one parish before a certain district judge, may, by consent of all the parties, be legally tried, and decided by the same judge while holding court in another parish of the district.

A judgment against a party in a suit brought by her, as owner, for the recovery of certain land, may be pleaded as *res adjudicata* in a subsequent petitory action for the same land, brought by her heirs.

So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are valid and legally binding.

When a testamentary executrix has been destituted of her office, a dative testamentary executor may be legally appointed to administer the succession.

The contents of a judgment may be proved by parol, when the loss of the court records containing the judgment has been accounted for.

When the money paid for the property of a decedent sold by an order of court, has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering the sum thus used.

**A** PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Kemp, J.* Trial by jury.

*H. H. Bryan, Jr., C. Iveson Bradley, and J. M. Wright* for plaintiff and appellees.

*Jas. H. Muse and E. F. Russell* for warrantor and appellants.

*McEnergy, Ellis & Ellis* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs seek in this petitory action to recover certain lands, as heirs of their father and mother. The defendant pleads *res adjudicata*, basing the plea upon a judgment rendered in a suit, wherein the mother was plaintiff, in the several capacities of executrix of her husband, of widow in community, and of legatee of her husband of the same land, and the defendant in that suit being the defendant in this, other defences are made, and among them is prescription.

John Sharkey, the father of the plaintiffs, died the owner of the land, which was sold under order of the court of proper jurisdiction to pay his and his succession's debts, and was then bought by the defendant at its appraised value. The price was paid cash, and was appropri-

80	891
48	303

80	891
106	820

30	891
119	786

30	891
1125	530

ated to the payment of the debts as directed in the mortuary proceedings. The process of monition was afterwards obtained by the defendant, and the sale was approved and confirmed. He then expended a large sum, \$12,000, in improvements upon the land, the purchase price of which was only \$2,500, and in this suit called Bach, who was the executor of Sharkey, in warranty. The alleged warrantor pleaded the sale under order of the court, the disbursement of the price among Sharkey's creditors, and his discharge by the court upon an account duly rendered of his gestion as executor.

The jury found for the plaintiffs against the defendant, awarding the land and improvements to them, and for the defendant against the warrantor for \$2,500. From a judgment in accordance with this verdict, the defendant and the warrantor appeal.

The judgment pleaded as *res adjudicata* was rendered in a suit instituted in the district court of Washington parish. At the December term 1868 of that Court, being unable to try the cause for want of time, all the parties agreed to take it over to St. Helena parish, where the district judge had to go to hold his court for that parish, and there try it. This was done. The cause was not transferred. It was heard as agreed on, and the judgment was sent, with the record, back to Washington parish, and at a subsequent term of that court, the judgment was signed in open court and was entered on the minutes of that court. We discover neither irregularity, nor other objection to this proceeding, which was mutually agreed to and desired by all the parties. *Rust v. Faust*, 15 Annual, 477.

Mrs. Sharkey was plaintiff in that suit as widow in community, and the judgment rendered therein concluded her rights to her moiety of the land, and as to that moiety, the plaintiffs, who derive title from her, are also concluded. Her additional capacity of legatee of the land under the husband's will, in which she also sued, would seem to have the same effect as to the other half, in the absence of any suit or allegation by his heirs that the property thus bequeathed exceeded the disposable portion, and in the absence of any proof that the will had ever been attacked, or annulled, *quoad* that bequest.

But the sale provoked by Bach, executor, is attacked as null for want of representative character in him. He was not dative executor of Sharkey's will, it is said, because Mrs. Sharkey, the testamentary executrix, was the proper and legal representative of the succession.

Sharkey died in March 1862, or his will was then probated; and his widow qualified under it as executrix. A few weeks thereafter, the city of New Orleans was captured by the naval forces of the United States, and the circumjacent territory fell under the military domination of that Government. The parish of Washington remained under the control of



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Sharkey vs. Bankston.

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the Confederate States. Its courts, officers, etc. continued to perform their functions as before. That the official acts of civil officers, performed within and upon a territorial area, possessed, held, and controlled by a government, as this was by the Confederate States, are valid and legally binding, is an unquestioned principle in the law of nations, and has never been denied by publicists. So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are validated from considerations of public policy and international interest, and the highest court of the United States has enforced this rule against itself. *U. S. v. Rice*, 4 Wheat. 246. *Lay v. O'Neil*, 29 Annual, 722.

Mrs. Sharkey abandoned her home in Washington parish, and went to New Orleans, and there remained, and became subject to the laws, and to the military control, of the Power then supreme there. Her oath of allegiance to that Power was taken. In June 1863 an act was passed by the legislature declaring all offices vacant, whose incumbents had taken that oath after January 1861. Acts 1863, p. 11. Mrs. Sharkey's office of executrix was alleged thus to be vacated, but was not filled until 1866, when Bach was appointed dative executor of the will of her husband. Manifestly, she could not then longer perform its functions. Legally she was an enemy to the government that alone discharged the duties of a government at and over the place where the succession was administered. Vattel, 399. Woolsey, Intern. Law, § 117.

It is said however that her office was never judicially declared vacant, and if it were, there is no proper proof of it. The plaintiff himself, moved by what he then deemed a patriotic zeal, actually instituted suit to destitute Mrs. Sharkey of her office in October 1864, on the grounds that her sworn allegiance to another and a hostile government prevented her from performing any legal functions, and Mrs. Sharkey was present there during that proceeding, and knew of its pendency. A judgment was entered as the plaintiff prayed—he who was plaintiff then being plaintiff now. In May 1866, Mrs. Sharkey, by petition to the circuit court of the United States in New Orleans, alleged that on Oct. 24, 1864 James Sharkey obtained a judgment against her, removing her as testamentary executrix, and that latterly Bach had been appointed, and praying to be reinstated. She did not obtain the desired judgment, and never afterwards attacked Bach's title.

The defendant could not produce the copy of the original judgment of destitution, because it could not be found, but he proved that in December 1864, a body of cavalry made a raid in that locality, and destroyed or mutilated the records of the courts, and tore and scattered the papers taken out of the different offices for miles on their retreat. The loss or absence of the paper was thus accounted for.

If all other defences fail, the defendant holds the impregnable position which our law, and the general principles of equity, alike sustain, viz that where money paid for the property of a decedent has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering, the sum thus beneficially used to extinguish the ancestor's obligation. This principle is not new to our jurisprudence. Our earliest sages consecrated it, and we have already availed ourselves of a fitting opportunity to re-affirm and proclaim it anew. *Daquin v. Coiron*, 6 New Series, 675. *Andrews v. Ackerson*, 8 New Series, 205. *Elliott v. Labarre*, 3 La. 541. *Foutelet v. Murrell*, 9 La. 299. *Brown v. Buony, ante*, 175. *Beauregard v. Leveau, ante*, 302.

The verdict of the jury ignored this sound principle of ethics and of law, and the judgment upon that verdict is erroneous. Therefore

It is ordered, and decreed that the verdict of the jury is set aside, the judgment of the lower court is avoided and reversed, and that the appellants do now have judgment against the plaintiffs upon their demand, and for the costs of the lower court and of appeal.

Mr. Justice Marr took no part in the decision of this cause.

No. 5502.

WILLIAM S. PETERKIN VS. GEORGE MARTIN.

Except in a case when there is an express agreement in derogation of the general rule, the sale of goods, produce, or merchandise by weight, tale, or measure, is not perfect, and the goods at the risk of the buyer, until they have been weighed, counted, or measured.

The purchaser of goods who has paid their price knowing them to be damaged when he paid for them, is not thereby estopped from suing for a diminution of price, and damages, when it appears that there was an understanding between him and the seller, at the moment of payment, that his rights of reclamation were reserved.

A vendor who is ignorant of the vices of the things sold, is liable only for the difference, at the time and place of sale, between the actual value of the thing sold, and what it would have been worth if sound; and the expenses connected with the sale.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

*Thomas J. Semmes and Robert Mott* for plaintiff and appellee.

*J. Ad. Rozier* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This case has been argued before us concurrently with that of "*Peterkin vs. Oglesby & Co., and Higby*," just decided, upon the

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suggestion that they involved substantially the same questions. But, as will be seen in the opinion in that case, we held that the plaintiff had failed to prove satisfactorily that the corn bought of Oglesby was, in fact, at the time of its weighing and delivery unsound.

In the present case, however, it is shown that, at least, that part of the Martin corn which constituted the last put aboard the vessel was, at its delivery on the fourth and fifth May, in a damaged and heated condition. This lot so last put on board consisted of about 2084 bushels of yellow, and 892 bushels of mixed corn, all belonging to Martin; and this mixed corn was evidently of the same lot of mixed corn that Martin had sold to Peterkin, and of which 5764 bushels had been run aboard with the Oglesby corn, since it is shown that all of Martin's mixed corn was kept together in the bins of the elevator. We think the evidence justifies us in concluding that the Martin corn was not, at the date of its weighing and being put aboard, in good, sound, merchantable condition.

The evidence shows that the plaintiff at time of contract agreed to pay the market price of good, sound corn, and he was entitled to such an article, unless there are circumstances in this case which vary the rule that a sound price entitles the purchaser to a sound article.

This the defendant contends is the case. He says that on the tenth April he sold the plaintiff all the mixed corn he had in the elevator, being six, seven, or eight thousand bushels, at sixty-five cents per bushel, to be taken away in a few days, and he contends that at that date it is not shown that the corn was unsound. That it was a sale of a determined lot, and that it put the thing at the risk of the purchaser from that date; that the sale was complete and perfect, therefore, on the tenth April. We do not think so. Article 2458, Civil Code, provides: "When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller until they be weighed, counted, or measured, etc." Article 2456, C. C., declares the sale "to be perfect between the parties, and the property of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, or the price paid." We apprehend that in a case like this (admitting, for the sake of the argument, it was a purchase of all the mixed corn of Martin in the elevator, though Peterkin seems to deny this), where the quantity was stated to be between six and eight thousand bushels, at sixty-five cents per bushel, the price was not agreed upon and ascertained in the sense of article 2456. Had the elevator taken fire, and the corn been consumed before it was weighed, defendant could not have sued for any specific sum as the ascertained

price of the corn. We think the rule of article 2458 governs this case. That by the very terms of that article a sale "by weight, tale, or measure," is not a sale "in lump." We agree with plaintiff's counsel that there can be no sale in lump, except for a lumping price. These views are, we think, in harmony with the jurisprudence of this State. See *Goodwyn vs. Pritchard*, 10 A. 250, where the precise point is decided. Also, *Larue vs. Blair*, 10 A. 242; 21 A. 235 and 414. Nothing short of an express agreement, in a case like this, will put the thing before it is weighed at the risk of the buyer. The argument of defendant's counsel as to the inexpediency or improbability of selling such articles as corn, eggs, butter, etc., subject to the call of the purchaser, can not vary a rule of law, or supply the place of proof that there was an agreement to vary it. It may be that a seller would do a very foolish thing in so doing, but if he does do it, he has no one to blame but himself.

— We hold, therefore, that the sale was not perfect until the weighing and delivery (which are contemporary acts at the elevator) on the third and fourth of May.

— As we have stated, the evidence satisfies us that the Martin corn was not in good merchantable condition at that time, and was not such an article as the defendant should have delivered. But it was loaded on a vessel which the plaintiff had chartered at heavy cost, and was mixed with other corn before plaintiff discovered its condition. It was — impracticable to cancel the sale under these circumstances; and the purchaser had the right to keep the thing, and "content himself with resorting to" an action for diminution of the price. C. C. 2541, 2542. These were the rights of the plaintiff on the fifth of May.

On the eighth of May, after some ineffectual efforts at adjustment, Martin brought suit and sequestered the corn on board ship. On the ninth May Peterkin paid him the full amount demanded, and thereby released the corn from seizure. On the one hand it is contended by Martin that this payment after suit, with full knowledge of the defects of the thing, estops plaintiff from bringing this suit now before us — which was only filed June 5, nearly a month after the payment. On the other hand Peterkin contends that said payment was made under duress and circumstances which deprive it of the character of a voluntary payment. That he had chartered the ship *Caspari*, at heavy cost; that she was loaded with 23,000 bushels of corn; that he had borrowed money in bank to make payments on her cargo, and given bills on London, with the promise to procure and annex the bills of lading; that the ship was on demurrage at a cost of eight pounds sterling per day; that this seizure prevented her sailing, and prevented his getting the bills of lading, and that it would have been ruinous to have awaited the results of a lawsuit. Under these circumstances, he paid the price.

Even if it be true, as contended by defendant's counsel, that a payment after suit, and in consequence of suit, can under no circumstances be held to have been made under duress (a proposition we are not prepared to unqualifiedly assent to), we think, under the facts of this case, the payment was made with the understanding and agreement that plaintiff's rights of reclamation were reserved.

The defendant himself in his testimony says that *after his seizure of the corn* Mr. Chism came to him on behalf of Mr. Peterkin, and proposed to leave the matter to arbitration; and that if he consented, Peterkin would at once pay the money, which defendant assented to. He says in another place that the proposition he accepted was "that the bill should be paid, and the matter left to arbitration." Chism substantially confirms these statements of Martin. Peterkin paid the amount of the defendant's bill on the ninth May. Under these circumstances, and in view of the strong equities of the plaintiff's claims, we are not disposed to enforce a doubtful and harsh rule which would cut off all right of reclamation.

The plaintiff's right of reclamation being determined, the next question is the extent of defendant's liability. Is he liable only for the difference between the value of the corn delivered and that of a sound article, at the time and place of sale? Or, also, for the damages suffered by plaintiff by delay and expenses of unloading the ship and passing the corn through the elevator again and reloading it, as well as for expenses of surveys here and in Ireland, loss on resale in Ireland, shrinkage, freights, etc.

The rule is that, where there is no fraud or bad faith, failure to comply with a contract renders the party liable only for such damages as the parties must have reasonably foreseen as the direct and immediate consequences of the breach.

It results from article 2545, C. C., that a vendor ignorant of the vices of the thing sold is not responsible in damages, but only to restitution or diminution of the price and repayment of expenses connected with the sale.

Now it is not shown satisfactorily that Martin even knew that this corn was bought for shipment to Europe, or for other long voyage. Peterkin says Martin was informed it was to be shipped, but does not say where. Martin denies that he knew any thing about its destination. There is no pretense of proof that Martin knew any thing of the unsoundness of the corn, or was in any way guilty of concealment, deceit, or fraud.

"In cases of this sort, where the seller is not cognizant of the hidden defects of the thing sold, he is liable for the difference, *at the time and place of sale*, between the actual value" of the thing sold, and

what it "would have been worth" if it had been a sound article. "The actual loss incurred by plaintiff in the foreign market where he sold the thing \* \* \* is not the rule of damages, although it may be considered with other evidence for the purpose of estimating the percentage of inferiority." Fuller vs. Cowell, 8 A. 136; see, also, 1 A. 27; 2 A. 67; 7 A. 613.

We think the rule, as stated above by Eustis, C. J., in Fuller vs. Cowell, is correct, and we shall apply it to this case.

In this record there is no very satisfactory proof of what was the value of this corn delivered to plaintiff by defendant at the time and place of sale, to wit, New Orleans, May 5, 1871. In the case of Peterkin vs. Oglesby, above referred to, the evidence on this subject is more full and satisfactory; but we can not regard that evidence in this case. The testimony taken in England shows that the corn was sold there at a loss of about twenty-five cents per bushel. Plaintiff in his original petition in this case alleges that it was worth about fifty cents per bushel here. That petition was filed about a month after the sale. We think that in the interest of all parties this litigation should, if possible, be now terminated; therefore, we will adopt fifty cents per bushel as the actual value of the corn delivered on May 5, 1871, in New Orleans. This would make a difference of fifteen cents per bushel; the corn having been bought at sixty-five cents. The number of bushels sold was 8735 41-56, which, at fifteen cents, amounts to \$1310 35, for which we think plaintiff should have judgment. We allow nothing to plaintiff for the unloading and re-elevating the corn to fit it for sea voyage, because the evidence does not satisfy us that defendant knew plaintiff's purposes in buying, and could not, therefore, have foreseen this expense.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that plaintiff, William S. Peterkin, do recover of the defendant, George Martin, \$1310 35, with legal interest from seventh day of June, 1871, till paid, and costs of both courts.

No. 7096.

FRITZ HACKENBURG VS. MRS. C. GARTSKAMP, TUTRIX, ET AL.

A contract of mandate for the purchase of real estate can not be proved by parol evidence, even when fraud in the alleged agent is set up.

Extra judicial admissions and confessions of a party can not be proved by parol, in a case where testimonial proof is inadmissible.

**A** PPEAL from the Second Judicial District Court, parish of Orleans.  
*Pardee, J.*

*J. N. Hagins and J. Q. A. Fellows for plaintiff and appellant.*

*B. C. Elliott for defendant and appellee.*

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Hackenburg vs. Gartskamp.

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The opinion of the court was delivered by

SPENCER J. On 17th February, 1866, Mrs. Chiapella, by public act before Selim Magner, notary, executed in favor of John Gartskamp an act of sale of three lots of ground in the Sixth District of New Orleans, wherein she acknowledges to have received from him the price, as follows : \$500 cash, and the note of purchaser for \$500 more, payable to his own order, and endorsed at one year.

John Gartskamp died some years ago, and said property was inventoried as part of his estate, and is in possession of his widow and heirs, defendants in this suit, who produce and file in evidence herein the note above described.

On 10th January, 1878, plaintiff brought this suit against said widow and heirs, and alleges—

First—That he purchased by act before Selim Magner, notary, on the 17th of February, 1866, these three lots and paid the price thereof, one thousand dollars, to Mrs. Chiapella.

Second—That John Gartskamp, deceased, acted as his agent and took the title in his own name.

Third—That Gartskamp repeatedly acknowledged the property to be plaintiff's and promised to transfer it, and would have done it, but for his death.

The case came up for trial on first of February, and plaintiff amended his petition, alleging—

Fourth—That Gartskamp took the title in his own name without the knowledge or consent of petitioner, concealed said fact from petitioner for a long time in fraud, and that on making the second payment, nine months after the sale, petitioner was still ignorant that the title stood in Gartskamp.

On the trial plaintiff offered to prove these allegations by his own testimony, and that of other witnesses, which testimony being objected to by defendants, as inadmissible, was rejected by the court, to which plaintiff excepted. There was judgment for defendants, and plaintiff appeals, and presents as the sole ground for decision the admissibility of parol evidence to prove the allegations of his petition. He does not produce or pretend that there ever existed any written evidence whatever of the facts he alleges.

First—He seeks to prove by parol a contract of mandate for purchase of real estate, which is prohibited by article 2992 C. C.

In *Muggah vs. Greig*, 2 L. 593, where the title of a slave was in *Muggah*, but the possession in *Greig*, who set up that the purchase was made for him, with his money, and that the slave had been delivered to him, this court said :

“ In the contract of sale or other transfer of immovables required

by law to be made in writing and which the parties are not permitted to support by testimonial proof, written evidence ought to be produced, as being alone legally admissible to establish the authority by which an agency is assumed for either of the contracting parties."

But the case of *Baden vs. Baden*, 4 L. 166, is still more pointed and conclusive. That suit was brought to compel the defendant to convey and transfer to the plaintiff certain lots of ground, which plaintiff alleged were bought for her deceased husband (of whom she is heir), through the agency of defendant, who fraudulently took title and refuses to convey. The defendant in that case, as in this, offered in evidence an authentic act of sale to himself, showing that he took the title in his own name and paid the price, part in cash, and gave his note for the balance.

Plaintiff offered to prove by parol that defendant, in making said purchase, acted as agent of her husband. The evidence was objected to. This court say, "the decision of the case depends entirely on the legal admissibility of testimonial proof to establish a contract of agency relating to sales and purchases of real estate." It then states that the negative had been held in *Muggah vs. Greig*, 2 L. 593, and continues, "But plaintiff's counsel claims the right to introduce parol proof to establish the mandate against defendant, on the ground of allegations of fraud against him in the petition. It is perhaps true, that contracts however solemnly entered into in appearance, and however completely clothed with legal formalities, may be annulled on account of simulation and fraud; and to prove such simulation and fraud, testimonial proof may be resorted to; but this can be legally done only when necessity requires an infringement of the general rules adopted to protect the inviolability of written contracts. The provisions of our Code render incompetent all oral testimony to prove a contract relating to the sale of real estate; and no means are left to a vendee of such things to enforce a verbal agreement to sell, except the oath of the vendor, although there is certainly a want of good faith and fraud on his part, in not performing his promise. When third persons attack contracts for fraud, testimonial proof is of necessity admissible to establish it. But when the allegation of simulation and fraud comes from one of the parties to a contract, he is bound to establish it by some written evidence, such as counter letter, etc." The court then says that "plaintiff's object is virtually to make out a title in herself to real estate by oral evidence alone," by basing her claim on a parol contract of mandate. "To admit such proof would, in our opinion, violate the rules of evidence ordained by the articles of the Code and destroy the protection intended to be given by them to proprietors of the most important property (real estate) in the State." See, also, 10 R. 35; 1 A. 73; 3 A. 333; 5 A. 132 and 204.



Second—Plaintiff seeks to prove by parol the acknowledgments and extra judicial confessions of Gartskamp, in support of a demand, "of which testimonial proof would be inadmissible," which is not permitted. See C. C. 2290.

If plaintiff's pretensions were admissible, the last barrier of safety for titles of real estate would be gone; for it would be then, by false swearing, possible to defeat every title.

What the plaintiff alleges may be true; yet it is far better that he suffer the penalty of his own negligence than that the door to fraud and perjury be thrown open and titles to real estate be rendered insecure.

There is nothing in the case relied upon by plaintiff, 7 Mart. 243, "*Hall vs. Sprigg*," to show that there was not written proof of the agency. See review of this case in 2 L. 593, above cited. The claim was that the defendant acting as plaintiff's agent, and buying with his money, had taken the title in his own name and refused to convey it to his principal. The objection was that parol evidence was inadmissible against or beyond the contents of the written title to defendant. The court said:

"No such thing is attempted here as contradicting the contents of the act; the plaintiff admits the whole of it; but he says that no such act ought to have been executed to the defendant in his own name, because he purchased as agent; and he says that after having caused the instrument to be so made, he is bound to transfer the property to his principal."

But if that case (which was decided under the Code of 1808) can be construed as establishing the doctrine that by merely alleging parol agency in a purchase of real estate, and fraudulent refusal to convey, one can recover real property, and maintain and establish title thereto, *wholly by parol proof*, we must say that it is in direct conflict with what are now fundamental principles of our law of titles, and overruled by the jurisprudence of half a century.

In the case of *Caldwell vs. Hennen*, 5 R. 20, cited by plaintiff, the agency was conclusively shown by written memoranda and other papers, made by A. Hennen, who actually made a formal title to his principal.

In *Livingston vs. Morgan*, 26 A. 646, also cited by plaintiff, the defendant had written numerous letters to plaintiff's mother acknowledging the agency, and besides freely admitted on trial all the facts, but defended his rights on the ground that plaintiff had not provided the money to meet his (defendant's) notes given for the price, after due notice to do so, and that, as he had been left to pay for the land out of his own means, it was his, etc.

In conclusion, we would say that an action to enforce the contract of mandate, the trust of which it is alleged the agent has fraudulently violated, presupposes that there was such contract; and such action

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Hackenburg vs. Gartskamp.

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must fail when no legal proof of this fundamental fact is produced. In other words, one must establish by legal evidence the existence of a contract before he can show by parol its violation.

There is no error in the judgment appealed from, and it is affirmed with costs.

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DISSENTING OPINION.

EGAN, J. The reports of the decisions of this court are full of cases where parol evidence has been received and considered to affect title to real estate where fraud or error are charged. Were it otherwise, the doctrines of the law and the provisions of the Code on the subject of the effect of fraud and error invalidating contracts may as well be expunged, as those guilty of fraud seldom or never leave written evidence of the fraud behind them, and error can seldom be otherwise shown. See C. C. 1881 and 1882. The reason why the true character of a simulated or pretended conveyance of real property can not ordinarily be shown as between the parties otherwise than by a counter letter, is because such conveyances are usually made to effect some fraudulent purpose, such as to shield the property of a debtor from the pursuit of his creditors, and in such case another principle of law intervenes and the law leaves the parties to the fraudulent conveyance where it finds them. That this is so, is manifest, because even in the same case, without any specific provision of the law in exception of the rule requiring written evidence to affect title to real estate, the courts have always permitted creditors to avoid the fraudulent contract made to their prejudice, and for this purpose, to introduce parol evidence. Indeed, it may be doubted if we are without positive warrant for this in the general provision of article 1848 of the C. C. as to how fraud may be proved—(i. e.) by simple or by conclusive presumptions, or by other evidence—a provision of the law which has been uniformly interpreted in all that class of cases to permit the reception of parol evidence of the fraud. So, also, in regard to the proof of error, see 15 L. 311, Robert vs. Boulat, 9 A. 29, in which case the defendant was allowed to prove by parol that he was the real and actual purchaser of real estate instead of another person, to whom the sheriff had, through mistake, made the deed, and in whose name it had stood for years on the record. I think that the doctrine is as much consecrated in our law as in any other system that "*uberrima fides*" is required of agents acting for others, and that they can not profit by their own fraud to appropriate either the money or the property of their principals; see Newton vs. York, 13 A. 18. To permit this would be to offer a premium for fraud and dishonesty. There is no propriety in applying to such cases the provision of the C. C. requiring a

power of attorney to buy real estate to be in writing. It seldom happens that the principal who signs the power retains, or has any written evidence signed by the agent, of his acceptance of the trust or agency. The requirement that the power shall be in writing, as was well said in the case of *Smith vs. Kemper*, 4 M. 409, is intended for the protection of the agent and not of the principal. In point of fact, the agent seldom signs or accepts the power in writing for any purpose, and it would be singular indeed if the principal should be allowed to prove the agency by a writing signed by himself alone, and which might be created by him at pleasure, and not to do so by the testimony of witnesses and admissions and acts of the agent. On the other hand, it would be equally singular if, as is the uniform practice, the only written evidence of the agency or power should be delivered to and left in the hands of the agent, who might deny its existence at pleasure to accomplish his fraud, and thus conclude his principal from all proof of the agency, if his own acceptance and acts as agent could not be shown by the best evidence in existence as in other cases. In the case of *Hall vs. Sprigg*, 7 M. 244, it was held that a purchase of land in one's own name, though with the money of another, and as his agent, may be shown by parol. In *Smith vs. Kemper*, 4 M. 409, it was held that the defendant claiming to be plaintiff's agent, who had bought land without the knowledge or authority of the latter in his name, can not defeat the sale till the plaintiff declare whether he accepts it or not, and that the plaintiff should recover the land. See, also, *Giannoni vs. Gunny*, 14 A. 632. In the case of *Brice vs. Doyal*, 10 A. 575, it was held that the principal might recover a slave purchased by his agent without written proof of his agent's authority to buy, and the suit itself was held to be equivalent to an original mandate in due form. C. C. 2979. In *Nolan vs. Shaw*, 6 A. 40, it was held that an agent using money or property of his principal has no title. In *Exchange Bank vs. Yorke*, 4 A. 138, it was held that where an agent makes for himself a purchase he should make for his principal, the latter may take and the former must account for it. It is matter of every day experience that administrators, tutors, and other fiduciaries and agents, made so by law, can not use the funds of their principals to acquire property for themselves, or acquire for themselves the property under their control, and that those whose interests are sought to be thus affected have the option to claim either the property, whatever its character, or the price or damages. This is but carrying out the universally recognized principle that an agent shall not be allowed to profit by a violation of his own trust or to do any act which shall place his own interest in antagonism to those of his principal. I am aware that there are decisions of this court based solely upon the literal terms of the law requiring written evidence to affect title to real estate in

direct conflict with these views. I think that those decisions, however, are based upon too narrow a view of the law and a too literal application to cases like the present of general principles not so intended, and from the operation of which there is as much reason to except cases like the present as those of any other class involving fraud, error, or violations of trust. The decisions of other States and countries, and of the United States, teem with authority in consonance with the views for which I argue and which were, I think, properly recognized in the cases quoted, and especially in the earlier decisions of this court, to which as supported by right reason, and sound morals, I think we should recur. The works of highest general authority also, without exception, inculcate the same principles and doctrine. Indisposition has prevented my enforcing and elaborating my views on this important branch of the law as I would desire and had intended. I would reserve the right still to do so but that the condition of the docket and rapid approach of the close of the term of this court forbid it. For these reasons I dissent from the views of the majority of the court in this case, and think that it is one of the cases in which that "*necessity*" for a departure from the ordinary rule referred to by this court in 6 A. 166 exists. See, also, 5 R. 20, and 26 A. 646. It is no more attempted here than in *Hall vs. Sprigg*, to contradict the written title, but to claim the benefit of it. If no written title had been made, then the principle invoked by the defense would apply, but as it was made, the inquiry is, who is the real beneficiary under it. This, in a case of violation of his trust by the agent, we think may be shown by parol, as otherwise the grossest fraud would be protected by resort to rules of law not intended to have that effect.

No. 6894.

THE STATE VS. JOSEPH M. JOHNSON.

The word "pants," in an indictment for larceny, sufficiently describes a thing which may be the subject of larceny.

It is not a just ground of complaint that the court below, in charging the jury that they were judges of the law and the evidence, added the words that, "if they thought they knew more of the law than the judge, it was their privilege to so believe."

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*H. N. Ogden*, Attorney General, for the State.

*Robert Caldwell* and *Jno. H. Dinkgrave* for defendant.

The opinion of the court was delivered by

DEBLANC, J. The accused was indicted for the larceny of "a pair of pants," found guilty and sentenced to hard labor. He appealed and

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contends that—for two reasons—the judgment pronounced against him should be arrested or this case remanded:

1. Because the judge refused to charge the jury that the word "*pants*" is indefinite, has no meaning in law, and can not be the subject of larceny.

2. Because, to the charge asked of, and given by the court, "that the jury are the judges of the law and the evidence, the court added: "if you believe that you know more law than the judge does, you can believe so."

1. Here and in common parlance, the word "*pants*" has completely superseded the word "*pantaloons*," and "the common acceptance of property is to govern its description, and the certainty must be to a common intent, by which is meant such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject matter of the offence charged.

Wharton, Criminal Law, ed. of 1874, vol. 1, p. 357, No. 355.

Neither the prisoner, the jurors, nor the judge could have been misled by the use of the word "*pants*," which sufficiently describes a thing which may be the subject of larceny.

2. The court did charge the jury that they were the judges of the law and the evidence, but defendant's counsel contends that it destroyed the effect of that charge, by adding—in substance—that if they thought they knew more of the law than the judge, it was their privilege to so believe. That remark did not tend to restrict the privilege so broadly acknowledged, nor even to repress the physical power which the jurors had and have to disregard the instructions of one, who—after all—is their legal, safest and most reliable guide.

If the jurors are unqualifiedly the judges, the sole judges of the law, why is it made the duty of the court to charge them, and exclusively as to what law is or is not applicable to the cause submitted to them?

The prisoner's objections to the judge's charges are not tenable.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed.

#### CONCURRING OPINION.

MANNING, C. J. It is not correct to tell a jury that they are the judges of the law, without explaining the modified sense in which alone they are so. It is not, and never has been, within the province of a jury to decide what the law of a case is. Except in periods when revolutionary passions dominated men's judgments, a jury has never been supposed to have the legal right to disregard the law as pronounced by the court to them.

It has become so customary of late years in this State for juries to be told, that they have that power, without adding that the exercise of this physical power is of itself a moral wrong; and the practice has become so general for the counsel of an accused person to persuade the jury that they have the right to usurp the function of the judge in this particular; and that too, not only without restraint by the judge, but often with his acquiescence; that from much repetition, it has almost come to be regarded as sound law.

I think it is time for this court to suppress this legal heresy, and to bring back the lower courts, and the profession, to the true, and now generally accepted rule, that the legal duty of a jury is to receive the law from the judge; and that a jury can not rightly exercise the physical power of disregarding the instructions of the court upon the law, any more than they can rightly find a verdict directly opposed to the proof of the facts.

The jury can not determine the law, or decide what is the law, or judge of the law, in any cause, except only in so far as the question of law is a component part, as it always is, of a general verdict. For example—the question of guilt in a criminal prosecution is compounded of two ingredients, 1. did the accused commit the act, and that is matter of fact, 2. is the act thus done a criminal offence, and that is matter of law. When the jury return a general verdict, they have necessarily passed upon the question of law, as well as upon the question of fact. But that is not what juries understand a judge to mean, when he tells them they are judges of the law as well as of the facts; nor is that what juries understand a judge to mean, when he tells them they have the *power* to decide the law in a given case; and therefore to tell them that, and nothing else, misleads them.

“My opinion, said Mr. Justice Story, is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court, but I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure.” *Battiste's case*. 2 Sumn. 243.

So also Chief Justice Shaw;—“it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion

## State vs. Johnson.

or direction of the court in matter of law. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent, and in the same manner, as they are conscientiously bound to decide all questions of fact according to the evidence." *Commonwealth v. Porter*, 10 Metc. 263.

"My firm conviction, said Mr. Justice Curtis, is that under the constitution of the United States, juries in criminal cases have not the right to decide any question of law, and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court." *U. S. v. Morris*, 1 Curtis C. C. 23.

There has been manifested so much misconception of the law on this matter of late, that I have thought it appropriate to state my views more at length than is done in the opinion of the court, in which and in the decree, I fully concur.

No. 5501.

WILLIAM J. PETERKIN VS. J. H. OGLESBY & CO. ET AL.

Before a vendee can recover for diminution of the price, and for damages, on account of the damaged condition of the merchandise bought by him, he must show with reasonable certainty, that the merchandise was in an unsound condition at the time he became its owner.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

*Semmes & Mott* for plaintiff and appellant.

*Kennard, Howe & Prentiss* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. The plaintiff on tenth April, 1871, bought of the defendants about "14,000 bushels mixed corn in elevator from same lot as went on steamship *St. Louis*, \* \* \* part payment to be made down and balance as soon as on board ship \* \* \* at sixty-five cents per bushel of fifty-six pounds." The plaintiff had on same day chartered the ship "*Caspari*," and, also, bought another lot of corn in elevator from George Martin at sixty-five cents per bushel, said lot supposed to be between 6000 and 8000 bushels.

The ship came to the elevator to receive her cargo on May 1, and on the order of Peterkin to that effect the elevator commenced, on the evening of that day, to run the Oglesby corn aboard. The process of weighing is effected as the corn passes from the bins to the vessel. The evidence shows that the loading and delivery of all of the Oglesby corn, and the greater part of the Martin corn, was completed early on the

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evening of the third May. Thereafter the corn put in was of the lots bought from Martin, the delivery of which into the vessel was continued for some time on the fourth May, when the plaintiff visited the ship, and on inspection found the corn at the hatches fore and aft to be in a heated and damaged condition. He immediately protested to the foreman of the elevator, who, he says, had handed him the samples from the hatches with the remark that "*this*" (from the front hatch) "is the Oglesby corn," and this" (from the rear hatch) "is the Martin corn." On the fifth of May the plaintiff returned with a friend to the ship, and again took samples from the two hatches, and found the corn heated and deteriorated. The plaintiff took the samples to Higby and to Martin, and protested against receiving or paying for the corn. No satisfactory arrangement having been effected, the defendants, Oglesby & Co. and Higby, sued out a sequestration on eighth May against the corn, for the price thereof, less \$5000 which had been paid, and the corn was sequestered on board ship. Peterkin had borrowed money from one of the banks to pay for the corn, on the promise to furnish therefor exchange on London, with the bills of lading of this corn annexed; which he could not do in consequence of this seizure. He had the vessel under charter, and she was on demurrage, at a heavy cost to him. On the ninth May he paid in full to Oglesby and Higby the amount demanded by them in said suit, and the costs thereof; thereby releasing the sequestration. A similar suit was brought by Martin for the corn sold by him, which was also dismissed in consequence of payment of his demands.

The plaintiff having thus released the cargo, the corn was, after being again passed through the elevator to dry it, shipped to Ireland and sold at heavy loss.

Plaintiff, on fifth June, 1871, brought against Oglesby & Co. and Higby this action *quantum minoris*, and for damages and expenses incurred by him, in so unloading and passing it through the elevator, and in paying for detention of the vessel, etc.

Many interesting legal questions have been raised and discussed by counsel at great length, but, under the view we take, it will not be necessary to pass upon them in this case.

Before a plaintiff can recover in a case like this he must prove with reasonable certainty that at the time he became owner the merchandise bought was in an unsound condition. For if the deterioration took place after his acquisition the loss is his, and he has no action for diminution of the price. We have read attentively the whole evidence in this case, and the more important parts of it several times, and we think that plaintiff has not only failed to prove this indispensable fact, but that if there is any faith to be given to witnesses apparently without



interest, and with the best means of knowledge, the defendants have proved the contrary to be true.

Bernine, the foreman of elevator, who had charge of this work of loading and delivering this corn from the elevator on the ship, swears that the Oglesby corn was the first put aboard; that it was at the bottom; that when put aboard it was cool and sound; that the heated corn taken as samples from the hatches after the loading was nearly done, on the fourth and fifth May, was the Martin corn. In these statements he is fully confirmed by L. J. Higby, one of the defendants, and president of the elevator company. As to the soundness of the Oglesby corn at the time it was put on board, he is also confirmed by Thuron Higby, secretary of the company, who swears that on the twelfth, and about twenty-sixth April, Peterkin examined the Oglesby corn in the bins of the elevator, and pronounced it good. Peterkin himself admits such examination about twelfth April, but denies it at the later date. It is shown that this Oglesby corn was the balance of a lot out of which plaintiff bought his shipment on the steamship St. Louis a short time before, and it is admitted this St. Louis shipment was good sound corn.

Now the only evidence which we find of the unsoundness of the Oglesby corn at the time of its delivery consists:

1. In Peterkin's statement that Bernine, the foreman, on the fourth May took a sample out of the forward hatch and one out of the aft hatch, and on handing him the former said: "This is the Oglesby corn," and of the latter, "this is the Martin corn," and that both samples were heated and damaged. Bernine positively denies making these declarations, and says he could not have said "This is the Oglesby corn," because it was not.

2. On the fifth May samples were taken from same hatches, the ship's bins being full, and these samples were found heated. About eleventh or twelfth May samples were taken by Belknap, a corn broker, by means of a "tryer" piercing the cargo to depth of about five feet below surface, and were found heated and discolored. Bernine, who loaded the vessel, gives it as his opinion that the Oglesby corn was not reached by this test.

3. When the vessel was unloaded, about fifteenth May, the whole cargo was found heated and damaged. It is shown, we think, satisfactorily, that if, at that season, damaged and heated corn were piled upon and mixed with sound corn, the whole would likely become infected in the course of a week or ten days; so that the fact of the Oglesby corn being heated at the time of unloading does not prove it to have been so when loaded.

Now can we accept these circumstances as establishing with reasonable certainty the bad condition of the Oglesby corn at the date of its

delivery, when its good condition is absolutely and positively sworn by one of the defendants, and by two other witnesses, who have no interest, and who had of necessity the best means of knowing its condition, especially when these positive statements are elsewhere corroborated, as stated heretofore, and contradicted by no one speaking of his own knowledge?

We think the plaintiff has failed to prove the essential facts of his case, and can not, therefore, recover.

The judgment below was in favor of defendants, and is, we think, correct, and it is therefore affirmed with costs.

No. 6071.

CITY OF NEW ORLEANS VS. F. P. FOURCHY.

One who claims exemption from an income tax on the ground that his income consists of property not liable to taxation, must affirmatively show that his income does so consist.

The exemptions from taxation of \$500 worth of household furniture, and \$1000 of income, do not violate article No. 118 of the constitution of this State requiring taxation to be equal, and uniform. It does not appear that unlawful exemptions of property, or omissions to tax certain property, will affect the validity of an entire assessment.

Oral evidence is not admissible to prove the written demand made by a property owner in New Orleans on the Administrator of Assessments, asking for a reduction of the assessment on his property. The written demand itself is the best evidence.

**A**PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

*Samuel P. Blanc* for plaintiff and appellee.

*B. R. Forman, J. D. Hill, and A. & W. Voorhies* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. One of the questions most elaborately discussed in this case is *dehors* the record, to wit: That the tax on defendant's income is unconstitutional, for the reason that the city had exempted \$1000 of income in violation of article 118 of the Constitution. We do not find in defendant's answer any allegation, nor in the record any proof of the fact that such an exemption was *in reality* made. True, there was a law of the State authorizing and directing such exemption, but *non constat* that the city did so, especially if the doing so would have been unconstitutional, as argued by defendant.

There is also assigned as error apparent on the face of the record, and by way of peremptory exception filed in this court, that the tax on

defendant's income is in violation of the act of Congress and the public policy of the United States exempting legal tender and national bank notes from State and municipal taxation. The argument is that the income is assessed at \$8000, and that we must presume these dollars to have been "legal tender" or "national bank" dollars, and, therefore, not taxable. There are, perhaps, many satisfactory answers which might be made to this proposition. It suffices to say that a court can not *presume* that one falls *within an exception to a general rule*. It must be proved. As there is no proof on the subject, and as *the general rule* is that incomes are taxable, we must hold that defendant falls *within the rule* and not *within the exception*.

In all other respects this case presents the same legal and constitutional questions as were presented in that of the "City of New Orleans vs. J. Davidson and J. D. Hill, et al.," lately decided. We have been pressed in earnest and able arguments to reconsider the grounds of our decision in that case. The questions are grave, and not free from difficulty; but, after much reflection, we are unable to reach any different conclusion from that already announced.

The question is, does article 118 of the Constitution of this State forbid the Legislature's exempting from taxation \$500 worth of household furniture? and what effects are produced on the assessment in general by illegal exemptions or omissions? Article 118 reads as follows:

"Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes," etc.

The defendant resists the payment of the taxes claimed of him by the city for the year 1875, for the reasons:

1. That the effect of the exemption of \$500 worth of household furniture is to destroy the "equal and uniform" character of the tax.
2. That the Constitution requires "*all property*" to be taxed, and that it must be taxed "in proportion to its value."
3. That the only property susceptible of being exempted is that "actually used for church, school, or charitable purposes," and that household furniture does not fall within these exceptions.

First. As regards the equality and uniformity of taxation: It is manifest that the exemption of \$500 worth of household furniture operates equally and uniformly, since all persons, including the defendant, enjoy its benefits. But it is said that under the operation of this rule a man possessing as his only property \$500 of household furniture pays no tax at all; while his neighbor, possessing \$1000 worth,

pays a tax on the excess over \$500. That the *per centum* of tax increases, therefore, as the amount of assessable property increases, and, therefore, the tax is not equal and uniform. This is undoubtedly mathematically true. The effect of every exemption, if we resort to abstract figuring, is, of course, to increase the per centum of tax on what is not exempted. But if we look at the question in the light of public policy, and of political economy, we can readily see that, perhaps, the exact sciences do not furnish absolutely the best rules for its solution. Judge Cooley, in his work on "Constitutional Limitations," says: "As a matter of State policy it might, also, be deemed proper to make general exemption of sufficient of the tools of trade, or other means of support, to enable the poor man, not yet a pauper, to escape becoming a public burden." In other words, that by a judicious system of exemptions the *per centum* of taxation might, *in fact*, be reduced on the property subjected to taxation by preventing the public burdens from being increased. He says again: "There is still ample room for apportionment after all such exemptions have been made. The constitutional requirement of equality and uniformity only extends to such objects of taxation as the Legislature shall determine to be properly subject to the burden. The power to determine the persons and objects to be taxed is trusted exclusively to the legislative department," etc. Burroughs, on Taxation, p. 62, says the rule of uniformity "must extend to all property subject to taxation, so that all property may be taxed alike, equally, which is taxing by a uniform rule." Again he says, p. 65: "The provision of uniformity does not prevent the State from exempting from taxation objects of charity, etc., and tools of mechanics to a limited extent." Judge Cooley says taxes on incomes "may be on all incomes, or on all with such exemption as will enable the taxpayer in a frugal manner to support himself and family." Taxation, p. 20.

These views are in accord with those expressed by this court in "State vs. Poydras," 9 A. 165, where it was said: "To be uniform, taxation need not be universal. Certain objects may be made its subjects, and others may be exempted from its operation; certain occupations may be taxed and others not; but as between the subjects of taxation in the same class there must be equality." See, also, 26 A. 493. When we turn to the legislation of the State we find it continually proceeding upon these as the recognized rules of taxation. We find it exempting always "all lands, buildings, etc., and all other property belonging to the United States, to this State, or to any parish, city, or incorporated town in this State." "Colleges, and the lots of land appurtenant thereto, and their apparatus, etc." "Capital stock of literary institutions, and library associations, and public lyceums." "Cemeteries and graveyards," whether public or private. "Household goods, and mechanics'

and laborers' tools, to the amount of \$500," and so on, in endless variety.

Second. But if defendant's argument is good, all these exemptions, except those for churches, schools, and charitable purposes, are unconstitutional, for he maintains that by the Constitution of 1868, "*All property*" or *none* must be taxed; and he cites article 118, which, as seen, declares that "all property shall be taxed in proportion to its value, to be ascertained as directed by law." We do not construe that clause as does the defendant. It simply means that the taxation of all property subject to tax shall be *ad valorem*. That specific taxes shall not be levied on property.

Third. We have seen that the uniform practice of the Legislature in this State has been to exempt many classes of property not embraced within the exception of "church, school, and charitable purposes." We have seen that that practice is sanctioned by the highest authority at home and abroad, as legitimate under similar constitutional provisions. We will only add that the question as to what property falls or shall be embraced within the class designated as for "church, school, or charitable purposes" is, of necessity, largely one of legislative discretion, and that this court would with reluctance interpose its opinions to thwart this legislative discretion, unless there was a manifest and flagrant abuse of it. We are not prepared to say that in any of the exemptions complained of the Legislature has transcended its authority. On the contrary, we think it a wise and beneficent exercise of it to exempt enough of the indispensables of life to save the poor from pauperism, and thus protect property and society from increased burdens.

Holding, therefore, as we do, that none of the exemptions complained of transcend the legislative discretion, it is unnecessary to consider the defendant's bills of exception to the refusal of the court below to allow him to prove the aggregate amount of these exemptions.

Nor is it necessary, perhaps, to express any opinion as to the effect of unlawful exemptions or omissions upon the validity of the entire assessment. But it seems proper to say that in our opinion such exemptions or omissions, whether willful or not, can not have the effect of avoiding the entire assessment. To so hold would be to put it in the power of one man, or of a few men, by misconduct or ignorance, to stop the operations of the State Government itself. For if the principle contended for is correct, it does not admit of degrees, and hence the willful omission or exemption of property to the value of \$10,000 from the rolls would as effectually invalidate the whole assessment as that of \$1,000,000. Besides, the weight of authority is greatly against the defendant's views. See *Cooley on Taxation*, p. 155; *People vs. McCreevy*, 34 Cal. 432; 1 Dill. 536, 542; 17 Penn. 339; see, also, 26 A. p. 702.

The only remaining question is that presented by defendant in his bill of exceptions to the rejection by the court *a qua* of the testimony of sundry witnesses to prove that his property was assessed too high, and that he had made a written demand on the administrator of assessments for its reduction. Defendant's allegation is that "one piece of his property had been assessed at \$23,600, when it was not worth over \$6000, and that he had in due season made a written demand for its reduction." The defendant seems to have been in error in this, for the tax list sued on enumerates four pieces of property, the highest value of any one piece being only \$8000, and their aggregate value only \$14,800.

The plaintiff, however, objected to the testimony of the witnesses offered, as not being the best evidence, as irrelevant, etc., and the court sustained the objection. We think the court did not err, as the proper and best evidence would have been the written demand, which the law required as a prerequisite to be made, and which defendant alleged he had made.

The judgment appealed from is affirmed with costs.

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#### DISSENTING OPINIONS.

DEBLANC, J. The Constitution provides—not that all the property which the Legislature shall think proper to tax—but that *all property*, nothing less—and not excluding even property used for church, school and charitable purposes—shall be taxed in proportion to its value. As to property *actually* used for such purposes—and none other—the Constitution empowers the Legislature to exempt it from taxation. To that exception, no exception can be added without violating the letter, and—I believe—the spirit of the constitutional enactment.

For two reasons, the exemption complained of is unconstitutional :

1. It withdraws, from the list of property subject to taxation, a considerable portion of the property, every fraction of which should be taxed.
2. It extends to property not used for church, school and charitable purposes, and—it is evident—not embraced in the constitutional exception.

The exemption—as to the income—is more clearly unconstitutional than that already referred to. The Constitution commands that an income tax shall be levied—not on any restricted class of persons—but upon ALL persons pursuing any occupation, trade or calling—not on *any excess* of their income over one thousand dollars, but *pro rata* on THE AMOUNT of the income. Can we qualify and restrict that unqualified and unrestricted clause, and hold—though the Constitution orders the levy of that tax on ALL persons, and on *the amount*—whatever it may be

—of the income, that the Legislature had or has the power to ordain an exemption repugnant to that clause, and to enact that said tax shall be levied but on one class of persons—those whose income exceed one thousand dollars, and on only the excess of the amount fixed by its enactment? This—I apprehend—can not be done without violating the article of the Constitution, relied upon by the defendants—C. art. 118.

Were taxes imposed, levied and paid in strict accordance with the provisions of that article, they would cease to be a discouraging burden, and would—light and multiplied tributes, almost unfelt by the people, come from every class and every direction.

For these reasons, I respectfully dissent from the opinion and decree read.

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EGAN, J. I concur in the views expressed in the dissenting opinion of Mr. Justice DeBlanc; and the more readily because by a comparison of the terms of article 118 of the Constitution of 1868, and those of article 124 of the Constitution of 1864, with those of article 123 of the Constitution of 1852, and article 127 of 1845, it will be perceived that there is a very marked and significant change which could not have been unintentional or without meaning. The Constitution of 1812 was entirely silent in regard to the power, mode, and objects of taxation, so that it furnishes no guide in this inquiry. Article 127 of the Constitution of 1845 reads: "Taxation shall be equal and uniform throughout the State (after the year 1848); all property *on which taxes may be levied* in this State shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value *on which taxes shall be levied*. The Legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade, or profession." The language of article 123 of the Constitution of 1852 is identically the same, leaving out the words "after the year 1848," while, for the first time in the history of the State, article 124 of the Constitution of 1864 altogether omitted the important qualifying words "on which taxes may be levied," and the words "on which taxes shall be levied," and simply provided that "taxation shall be equal and uniform throughout the State. *All property shall be taxed in proportion to its value*, to be ascertained as directed by law;" followed immediately by the provision: "The General Assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes;" and by the *positive, mandatory* words: "The General Assembly shall levy an income tax upon all persons pursuing any occupation, trade, or calling, and "all tax on income shall be *pro rata* on the amount of income or business done." The provisions of article 118 of

the Constitution of 1868 are the same, except that the word "may" instead of "shall" is used in regard to the levy of a tax upon income.

It thus appears that in the two later Constitutions, including the present, *all property* except that specially exempted is required to be taxed, as well as to be taxed *ad valorem*; and that *all incomes*, if any tax on income is imposed, are required to be taxed, as well as to be taxed *pro rata* on their amount. I think that the Constitution contemplates that all property not embraced within the exemptions stated in it shall be taxed, and that the burdens of taxation on the defendants have been increased without warrant of law, and that they have a right to redress through the courts, their only resort. The evidence is more full on all the points in the case of Davidson & Hill. In *City vs. Davidson & Hill* it is admitted that the exemptions complained of amount to millions of dollars, but it is sufficient in all. I think the rule, and reason of the rule, as announced by Cooley and Burroughs, can not operate in the teeth of the provisions of the Constitution of this State to the contrary. I base my conclusions wholly upon those provisions which are unlike in important particulars those invoked as similar. Were it otherwise, the general principle invoked by the plaintiff might apply.

I therefore conclude that this case, and the others of the same character, are with the defendants, and dissent from the views of a majority of the court, and from its decrees in all of them.

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No. 7056.

THE STATE VS. GEORGE SALES ET AL.

Where the jury in a criminal case bring in a verdict not responsive to any charge in the indictment, it is proper for the court to direct them to retire, and bring in a proper verdict.

An indictment which states that one of the accused did "assist and abet" the killing and murdering, and then charges that he was "accessory before the fact to the killing and murdering," is fatally inconsistent.

**A**PPEAL from the Fifth Judicial District Court, parish of St. Tammany. *Kemp, J.*

*H. N. Ogden*, Attorney General, for the State.

*J. M. Thompson* and *E. F. Russell* for defendant.

The opinion of the court was delivered by

EGAN, J. George Sales was indicted for the murder of one Taylor. In the same indictment it was also charged "that one Dan Proffit, one William Sales, and one Edward Ryan, with force and arms did feloniously, willfully, and of their malice aforethought (did) *assist* and *abet* the said George Sales in the killing and murdering the said William Taylor



aforesaid, etc." "Therefore (the grand jury) do find and present the said Dan Proffit, William Sales, and Edward Ryan, as aforesaid, being accessory before the fact of the killing and murdering the aforesaid William Taylor." Under this anomalous indictment the accused were jointly tried, and as appears from the agreed statement of facts in the record the jury after deliberating returned into court with a verdict of guilty without capital punishment as to George Sales, and found the other defendants guilty *as accessories after the fact*, a crime with which it is not pretended that they were charged, and which both in its nature and punishment is distinct from either the crime of murder or of being accessory before the fact to murder. R. S. 1870, sections 784, 972, and 973. The judge refused to receive the verdict after it had been read by the clerk, and ordered the jurors back to their room. They finally returned a verdict of guilty without capital punishment as to George Sales, acquitted William Sales and Edward Ryan, and found Dan Proffit "guilty as accessory before the fact, without capital punishment," a qualification unnecessary, as under the law one convicted as accessory before the fact can only suffer the same kind and extent of punishment as the principal offender. R. S. 972. After an ineffectual motion for new trial and in arrest of judgment the parties found guilty were sentenced to the Penitentiary for life. Dan Proffit alone has appealed.

The motion in arrest of judgment is based, first, on the jury having first returned a verdict of guilty of the lesser offense of being *accessory after the fact*, and it being therefore illegal and incompetent for them to reconsider their verdict and convict the defendant Proffit of a greater offense, and on the inconsistency and illegality of the indictment in *first* charging that the accused Proffit did "*assist and abet*" George Sales in the killing and murdering charged, and afterward that he was "accessory before the fact to the killing and murdering."

As to the first ground, it is only necessary to say that the verdict first brought in by the jury was not responsive to any charge contained in the indictment as to the defendant Proffit, and the judge therefore did not err in directing them to retire and bring in a proper verdict.

As to the second ground of the motion in arrest, we think the objection to the indictment fatal. The accused Proffit was evidently intended to be indicted as accessory before the fact, but the statement in the indictment that he did with force and arms willfully and feloniously and with malice aforethought "*assist and abet*" the killing and murdering is wholly inconsistent with the charge of being accessory either before or after the fact, and one so charged can not be indicted as accessory. *State vs. White*, 7 A. 531; *Chitty's Crim. Law*, 262, 269; *State vs. Maxent*, 10 A. 743. An accessory before the fact is one who being *absent* at the time of the commission of the crime (and of course being

unable to "*assist and abet*" in its commission) doth yet procure, counsel, or command its commission. 1st Hale's Pleas of the Crown, p. 616. The indictment is therefore bad for this reason, and as it attempts to charge the accused as accessory before the fact in terms it is also bad as an indictment against Proffit as a principal offender, as he could not be both absent and present at the same time, and without being present could not be a principal in the murder. Besides, the indictment contains but one count, and even if both crimes were consistent and otherwise properly charged, it would be bad for that reason also.

The motion in arrest of judgment must prevail.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and reversed; that the judgment be arrested, and the appellant Dan Proffit be discharged from custody and further prosecution.

No. 6899.

THE STATE vs. DAVID SIES.

Where the legality of a tax is in dispute this court has jurisdiction irrespective of the amount involved.

Retail grocers who have paid their licenses are not entitled, as such, to sell liquor by the glass, but are entitled to sell it in quantities less than a gallon, to be consumed out of their stores.

**A** PPEAL from the Parish Court of Avoyelles. *Normand, J.*

*H. N. Ogden*, Attorney General, for the State.

*A. & W. Voorhies* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. This suit was brought in the parish Court of Avoyelles, to recover from defendant the sum of three hundred and twelve dollars—for this:

1. That—from the 1st of January 1877, until the institution of this suit—in July last—defendant sold or gave away—as a retail grocer or dealer—distilled liquors in less quantity than a gallon, and—as such—owes the State a license of eighty-five dollars.

2. That—for having failed to procure and exhibit said license, he is subject to a fine which—including the fees of the district attorney—amounts to one hundred and fifty-two dollars.

This action was brought in the name of the State, and defendant enjoined from carrying on his business as a retail grocer until payment of the license, fine and penalties claimed from him.

He excepted to the jurisdiction of the parish Court, on the ground that the amount involved in this suit exceeds five hundred dollars, and

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—here—plaintiff moves that the appeal be dismissed, because the matter in dispute is less than that amount.

We have—before us—a case in which the legality of a tax is contested by the party from whom it is claimed, and the Constitution provides—in express terms, that—whatever may be the amount of the disputed tax—the jurisdiction of this Court extends to such a case.

Const. art. 74.

Is defendant liable for a license of \$85, as keeper of a coffeehouse, in addition to that of \$15, which he has paid as a retail grocer?

He did not sell by the glass, but sold in quantity less than a gallon, and this he had the right to do under the license which he paid.

The law—on this point—is not as clear as it might have been—but it contains a provision which—of itself is sufficient to defeat plaintiff's action. That provision is in these words: "All retail grocers selling *by the glass* shall pay—in addition to the grocery license, that required to keep a coffeehouse."

These expressions leave no doubt that the only grocers from whom that license could have been exacted under the law relied upon by the district attorney, were those alone who sold by the glass, and not those who—as defendant—sold by fractions of a gallon, to be consumed out of their store.

It is—therefore—ordered, adjudged and decreed that the judgment appealed from is avoided and reversed, and plaintiff's demand rejected with costs in both Courts.

No. 6955.

#### THE STATE VS. BEN WEASEL ET AL.

The confession made by one of two persons jointly indicted for the same offense, and tried together by the same jury, is not admissible in evidence against any one but himself, no matter whether that confession be made in the course of his address to the judge, or in the form of a plea of guilty.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*H. N. Ogden*, Attorney General, for the State.

*John H. Dinkgrave* for defendant.

The opinion of the court was delivered by

EGAN, J. The defendants were jointly indicted, tried, and found guilty of larceny of a hog and sentenced each to two years imprisonment in the Penitentiary. Williams alone has appealed. He assigns as error in this court that the record does not disclose that a grand jury was ever impaneled at the term at which the indictment appears to have

been found, nor that the person whose name appears as foreman of the grand jury was ever appointed as such, or that he had any authority as such to *indorse* the indictment a true bill and sign the same. Our attention is also called to a bill of exceptions to the ruling of the court in permitting the other defendant, Weasel, to state upon the trial, and after the evidence had closed and the opening argument of the District Attorney had been made, "that he had been persuaded into the offense by (his co-defendant) Robert Williams, and that he had struck the first lick, and Williams finished the killing." The bill states that this statement was made in obedience to the instruction of Weasel's counsel, who was not the same who represented the defendant, Williams. The court states that permission to make this statement was asked for by the counsel for Weasel and not granted; but the court stated that the accused had the constitutional right to be heard by himself or by counsel, and that if he desired to do so he might address the jury in his own behalf, which he proceeded to do, and in this address the statement complained of was made. The defendants were being tried together at the time under a joint indictment for the same offense, and before the same jury which subsequently found them both guilty. The confession was not admissible in evidence against any one but the person making it. Greenleaf's Ev., volume one, third edition, sec. 233; State vs. Fontaine, 26 A. 513. It does not appear to have been so restricted by any instructions from the court, and was no more admissible when made in the form of an address to the jury than if made in the form of a plea of guilty, or an admission of guilt. Indeed, there is good authority for the position that if the accused be represented by counsel on his trial he has not the right to be heard himself, and as a rule it is quite unusual to permit both. We think the judge erred as to this constitutional right where, as in this instance, he was so defended by counsel. At all events, neither under this nor any other pretext, could any statement or confession made by Weasel be heard to affect his co-defendant, Williams. That it was well calculated to do so, and to influence the verdict of the jury subsequently rendered, can not be questioned. The State could not exclude his sworn testimony on the ground of his being "*particeps criminis*," and yet avail itself of this *unsworn* statement against the other defendant, Williams. As to the errors assigned, the trial being in the same court where the bill was found, they might be corrected by *certiorari* if the facts were otherwise. State vs. Gates, 9 A. 94. But as we have concluded to remand the case on the other ground it is unnecessary to pass directly upon them.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be avoided and set aside, and the case remanded for a new trial as to the defendant, Williams.

No. 6976.

## THE STATE VS. JOHN JOHNSON.

The verdict of a jury in a criminal case will not be set aside on the ground that while the jury were deliberating on the case, two of the jurors separated from the others, on a call of nature, when it appears that they were attended by a deputy sheriff and spoke to no one while they were out.

It is not within the province of the judge presiding at a criminal trial to give such instructions to the jury, after they have returned a valid verdict in the case, as shall lead to a change, or modification of the verdict.

When in a prosecution for murder based entirely on circumstantial evidence, the State finds it necessary, as a link in the chain of that evidence, to trace to the accused a motive for the homicide in his previous quarrel with the deceased, it is competent for the defense to prove facts showing similar, or stronger motives in others to do the same act.

**A** PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Yoist, J.*

*H. N. Ogden*, Attorney General, for the State.

No counsel for the defendant.

The opinion of the court was delivered by

EGAN, J. The defendant was indicted for murder, and found guilty without capital punishment, and sentenced accordingly to the Penitentiary for life. He has appealed, and is unrepresented by counsel in this court. The errors complained of are presented in bills of exceptions, accompanied by a motion for new trial, referred to in them.

The first objection was to an alleged separation of the jury while deliberating on the case. This separation consisted in two of the jurors being permitted by the court to leave the jury room to attend to a call of nature, under the charge of a deputy sheriff, who testified that they spoke to no one, not even to him, while they were out. It would have been more regular and better had they not been permitted to separate from the other jurors, who should all have retired together. Too much caution can not be exercised in the trial of capital cases, especially to guard against the separation of the jury, and the consequent avoidance of verdict and trial. The court *a qua* refused a new trial, not considering the separation proved to be such as might be supposed to affect the verdict. In the *State vs. Truber*, 10 A. 501, this court said: "The rule can not be extended to such temporary or necessary separations as may be necessarily anticipated, or must necessarily occur in the course of a protracted trial;" and that, assuming the truth of the statements of the witnesses as to the facts of which the court below was the exclusive judge, it was not prepared to differ with its decision upon these facts as stated in the record, language which we may adopt in the present case.

Second. The jury, after deliberating, brought into court a verdict of guilty, with a recommendation of the accused to the mercy of the

80	921
44	1116
30	921
105	414
30	921
111	804
30	921
114	90

court, whereupon, at the suggestion of the district attorney, the judge told the jury: "If by that verdict they intended to say, "guilty without capital punishment, they should retire again to their room, and bring in a verdict in accordance therewith;" which was objected to by defendant as "illegal, and a dictation to the jury of the guilt of the prisoner." The recommendation to the mercy of the court did not vitiate the verdict of guilty as first brought in by the jury, and the court should have received the verdict, and had it recorded. It is difficult to perceive in what the accused was injured by the qualification of the verdict, without capital punishment, as subsequently made by the jury; nevertheless, it is possible that the change from the original verdict, which was in legal intentment a simple, unqualified verdict of guilty, to guilty without capital punishment, may not have been wholly without moral effect, at least in the subsequent stages of the case, and we think that in so grave a matter if he desired it, even because he preferred death to imprisonment for life, the accused was entitled to have the verdict entered as originally returned into court. Under that verdict the law gave the judge no discretion as to the character of his sentence. The recommendation to mercy could not affect the sentence in a case in which the court had no discretion. Had the jury asked instructions as to the legal effect of the recommendation to the mercy of the court before announcing their verdict, it would have been proper for the judge to give them, but not afterward to permit and invite a change in a legal verdict once rendered. It was the province of the jury, and not of the court, to qualify the verdict, and we must presume that the judge *a quo* had so instructed them in his charge, as it was his duty to do. The power to dictate or cause a change of verdict in a capital case is too dangerous to be sanctioned.

Third. It appears that the case of the prosecution rested at least largely on circumstantial evidence, there being no witnesses to the homicide, and that the State offered evidence of the quarrelsome character of the deceased, and of a quarrel a day or two before his death with the accused, who had, while in liquor, uttered threats against the deceased. Whereupon, on cross-examination of the State's witness, the counsel for the accused offered to prove in rebuttal that the deceased had quarrels with other persons a few days previous to the murder, and that the persons with whom those quarrels were had had "more reason for committing the murder than the accused;" and asked the witness on the stand "what other quarrels the deceased had besides that with the accused a short time previously with other persons;" whereupon, the State objecting that the evidence was irrelevant and inadmissible, the court refused to permit the question asked, or to hear the evidence, and the defendant excepted. It is not our province to consider what

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State vs. Johnson.

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was or what was not proven in the court below, or whether the conviction was justified by the evidence.

From the character of the evidence already offered by the State, as set forth in the bill, and in the absence of direct evidence of the commission of the homicide by the accused, we can very well see how the evidence offered might have had an important bearing upon the question at issue, and while neither the quarrelsome temper of the deceased, nor the fact of his having quarrels with other persons than the accused at other times, would under ordinary circumstances be receivable, or afford ground of defense when it became necessary for the State, as a link in the chain of circumstantial evidence, to trace to the accused a motive for the homicide in this previous quarrel with the deceased, we are not prepared to say how far the evidence rejected might have influenced the verdict, and we think it was competent for the defense to show the fact of the existence of similar or stronger motive in others to do the same act which, when coupled with other facts and circumstances, might point in another direction. At all events, in the absence of any counsel for the accused in this court and by reason of the other rulings already considered, we are disposed to give the accused the benefit of a new trial, and the opportunity to produce his evidence.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and reversed, and the case remanded for new trial, according to law and the principles of this opinion.

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CONCURRING OPINIONS.

MANNING, C. J. I think the two verdicts mean the same thing. When the jury found the prisoner guilty, and recommended him to the mercy of the court, they expressed in their own natural way what the law expresses in the statutory words, 'guilty without capital punishment.' If the first verdict can, or should, be construed as an unqualified one, the recommendation to mercy is senseless and unmeaning, because the court could pass but one sentence on the convicted person. There was no option with the court then. It could show no mercy.

The law, in reverence of the sanctity of human life, and in tender compassion for the frailty of man, has given to a jury a part of the function of a judge, when sitting upon a case involving life. The proper, and generally the sole, function of a jury is to find the fact of guilt or innocence. To the judge is confided the power and the discretion to impose a greater or less punishment, within the range which the law has established as meet for the offense of which the prisoner is convicted. But in a capital case, the jury can assume *pro hac vice* this power of a

judge, and pronounce that the convict shall not suffer the extreme penalty of the law. The statute has provided the jury with a phrase, or form of words, to express their meaning, when they exercise this faculty, but those words are not sacramental, and the use of others, such as those of the first verdict, will serve the same legal purpose.

The judge must have desired only that the jury should put their verdict in the usual and unmistakable language of the statute, and for that purpose sent them back. This has not to me the appearance of a dictation, or even a suggestion, of a verdict.

There was error in the rejection of the testimony, as is shown in the opinion just read by my brother Egan, which compels the remanding of the case, and for that reason, I concur in the decree.

DEBLANC, J. I concur in the opinion of Chief Justice Manning.

MARR, J. I concur in the decree remanding this case, and in the opinion of Chief Justice Manning.

#### No. 6945.

#### SUCCESSION OF FRANÇOIS LACROIX.

In a rule to compel the purchaser of property at a succession sale to comply with his bid, he can not put at issue the rightfulness of the recusation of the judge of the court from which the order for the sale issued.

When the father of this probate judge is a creditor of a succession, and joins the administrator in the petition for a sale of the succession property, the judge may properly recuse himself from passing on the application for an order of sale. In such a case the judge *ad hoc* should sign the order of sale.

The probate court has jurisdiction to order the sale of the property of an insolvent succession without convoking a meeting of its creditors.

The fact that the succession property was sold by order of court, one half cash and the balance on a credit of twelve months, will not, of itself, vitiate the title passed by the sale.

**A** PPEAL from the Second District Court, parish of Orleans. *Tully*, Judge *ad hoc*.

*W. O. Denegre* for the succession and appellee.

*Frank Michinard* for *J. Anglade*, adjudicatee.

The opinion of the court was delivered by

EGAN, J. The defendant, the purchaser of succession property at succession sale, was regularly put in default on refusing to comply with his bid and the terms of sale, whereupon this rule was taken to compel compliance. But two questions are presented for our consideration: First, the rightfulness of the recusation of the judge of the Second District Court of Orleans, from which the order of sale emanated, through a judge *ad hoc* called to the bench in consequence of the judge's recusa-



## Succession of Lacroix.

tion. Of this it may be remarked that the order of recusation having been entered, it can not be treated as an absolute nullity, and set up by the defendant in this collateral way. The principle "*omnia præsumuntur rite acta sunt*" would come in aid of the title acquired by the defendant at the probate sale, and we can not see what right he who was no party to the succession proceedings or order can have to contest its validity. The recusation was, however, properly entered; the father of the presiding judge was a creditor of the succession, and joined in the petition of the administrator for the sale. There is no force in the position that, although recused, the judge of the court should have signed the order of sale, instead of the judge *ad hoc*. The books are full of cases to the contrary, and the practice has been universally otherwise in this State. Indeed, it often happened that while the system of interchange for the trial of recused cases prevailed the interchanging judges were holding court at the same time in different and distant parishes. The signature of the judge *ad hoc* is the only proper one to be affixed to the orders granted by him. He is *pro hac vice* as much the judge of the court as the regularly elected and presiding judge, and his acts as such are entitled to as full recognition, and afford as full evidence of what is done. Any party in interest may appeal from the order of recusation, but unless it is done suspensively the order will be executed notwithstanding, and any rights acquired by third persons under it will be protected accordingly. The other objection to the validity of the sale is that the succession is insolvent, and that a sale of property could not be legally ordered without the convocation, first, of a meeting of creditors, that they might fix the terms of sale. Of this it may be remarked that the court which issued the order had jurisdiction, beyond question, and that it is too well settled to be now questioned that the purchaser was not required to look beyond that. Besides, the same presumption arises as to this just invoked as to the order of recusation. The fact that the sale was ordered one half for cash, and the remainder on twelve months credit, did not of itself vitiate the title. It is true that the law contemplates an offering first for cash, of succession property sold to pay debts, and then on twelve months credit, if it fails to bring its appraised value, and that such is the usual and regular mode of sale. If the administrator departs from it, and injury is likely to accrue, or is apprehended by the creditors, they may stay his hands by injunction before sale, or may hold him responsible after, upon proof that loss has actually resulted. It by no means follows, however, that titles acquired fairly, in good faith, and in open market under such sale, are to be set aside for that reason only. In the present case the petition of the administrator was joined in by at least a dozen creditors, than whom there is no proof that there are any others. It represents that the sale

is necessary, and that it is to the interest of creditors that it should be made on the terms asked for, and is supported by the affidavit of the attorney that the property would sell for twenty-five per cent more on a credit than for cash. There is no allegation or evidence that the property brought less than its appraised or real value, nor does any one appear to complain of the sale, except the purchaser, a third person as to all of these proceedings, except the sale itself, and this rule to enforce it. We think the defenses set up untenable. The interests of the creditors and of the succession seem to have been well guarded in the order of sale, and no one who has any interest or right to complain is before us for that purpose.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is affirmed, with costs of appeal.

## No. 6136.

## HILLARY EDWARDS VS. WM. RICKS ET AL.

30	926
118	454
118	455
30	926
122	125

Neither the heirs of a deceased wrongdoer nor his widow in community, can be held liable in vindictive damages for any wrong committed by him, when no suit for damages has been instituted before his death. The measure of their liability, in such cases, is the actual damage done to the person or property of the sufferer.

The heirs of age of a deceased person are presumed to accept the succession, and his widow to accept the community, unless the heirs renounce the succession, and the widow the community, expressly, and by public act.

When one is sued as heir, or widow in community, or in any other representative capacity, the plea of general denial admits that capacity.

The widow in community is liable for one half, and the heirs of the deceased, each for his virile portion of the other half of the debt due by the deceased on account of a trespass committed by him.

**A** PPEAL from the Sixth Judicial District Court, parish of Tangipahoa. Trial by jury. *Kemp, J.*

*James H. Muse and E. F. Russell* for plaintiff and appellee.

*McEnery, Ellis & Ellis* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. The plaintiff alleges that Wade H. Varnado and William Ricks, in March, 1875, with force and arms, drove his family out of his dwelling, and away from his premises, and lawlessly threw his furniture out of said dwelling, thus dispossessing petitioner of his home, and then nailed the doors and windows, and prevented petitioner's return to his said home; and that, by their "violent, lawless, and criminal conduct," they damaged him in the sum of \$5000.

That since said wrong *Wade H. Varnado has departed this life, leav-*

ing his widow, Dicey Varnado, and Celia Varnado, wife of William Ricks, and R. Scott Varnado, children of age; and that said widow and two heirs, Celia and R. Scott Varnado, have taken possession of his property without inventory, and are, therefore, liable for the debts of said deceased wrongdoer and trespasser aforesaid.

He prays for judgment against Ricks for \$5000, and against the widow and two heirs of Wade H. Varnado, jointly, for \$5000, according to their respective interests in the estate of said Wade H. Varnado.

The defendants pleaded the general denial. The case was tried by a jury, who found a verdict for \$5000 damages for plaintiff. The court thereupon rendered judgment against the defendants for that sum, as follows: against Ricks for \$5000; against the widow in community for \$2500; and against each of the two heirs for \$1250, the judgment being *in solido*. Defendants appeal.

1. They urge in this court on behalf of the widow and heirs of Wade H. Varnado, that the action against an offender is personal, and dies with him.

2. That there is no proof that Dicey Varnado is the widow, nor that Celia and R. Scott Varnado are the heirs of Wade H. Varnado, nor that they are possessed of his estate.

3. That the judgment is not in conformity to the verdict.

4. That the damages are excessive.

We will consider these objections in their order.

1. As to the liability of heirs and legal representatives of the wrongdoer for damages resulting from his torts, crimes, and offenses. Under the Roman civil law, except when instituted and put at issue before death, actions for damages resulting from crimes and offenses perished by the death of the wrongdoer, or of the sufferer; with this qualification, however, that the heir of the wrongdoer was not permitted to profit by the wrong, or retain the fruits of it. Inst. Lib. iv. tit. 12, sec. 1; Dig. 50, tit. 17, l. 38.

Both principles have been modified by express provision of our law.

Article 25, C. P., provides: "Heirs and universal legatees may be sued for civil reparation of the injury caused by the crimes or misdemeanors of the deceased whose succession they have accepted, although no action was instituted for that purpose against the deceased during his life, and although neither he nor his heirs have been benefited by such offense." The act of 1855, now part of article 2315, C. C., provides that "the right of this action shall survive in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death."

By our law, as by the Roman law, actions for torts do not abate by the death of either of the parties after issue joined. C. P. 21, Vincent vs. Sharp, 9 A. 463.

It will be seen that by article 25, C. P., the liability of the heirs and representatives of the wrongdoer, who has not been sued before his death, is limited to the civil reparation of the injury done by him. This language, we think, clearly excludes their liability for exemplary or punitive damages. The measure of their liability consists in repairing the actual damage done to the person or property of the sufferer. Any thing more is in the nature of punishment, and neither reason nor law would sanction its infliction upon any other than the wrongdoer. The same principle should apply to the liability of the surviving widow who accepts the community. Her liability is for one half the community debts, and should cease when civil reparation ends. Any more would be punitive.

These views are those held by us in the case of "Jones vs. Succession of Hoss," 29 A. 564, where we held in substance that actions for injury done to the feelings and reputation, not affecting person or property, did not survive against the heirs of the wrongdoer. We adhere to that view.

2. The plaintiff sues Dicey Varnado as widow in community, and Celia and R. Scott Varnado as unconditional heirs of Wade H. Varnado. Their answer is a general denial.

It appears from the evidence and pleadings that Dicey is the widow, and R. Scott an heir of the deceased, Wade H. Varnado, but there is no proof as to Celia.

Article 1000, C. C., declares that "the person called to the succession does an act which makes him liable as heir, *if when cited before a court of justice as heir*, for a debt of the deceased, he suffer judgment to be given against him in that capacity, without claiming the benefit of inventory, or renouncing the succession."

Civil Code, article 1017, provides: "The renunciation of a succession is not presumed; it must be made expressly by public act, etc." The same rules are applicable to the wife's acceptance or renunciation of the community, when terminated by death of the husband, except that she can not accept under benefit of inventory. She is presumed to accept if she does not expressly renounce. *Ludeling vs. Felton*, 29 A. 719.

When a party sues or is sued in a representative capacity conferred by law, such as curator, tutor, heir, etc., a general denial does not put at issue the existence of that capacity. 1 A. 336; 3 M. 378; 2 N. S. 389; 4 N. S. 615; 5 N. S. 343; 1 L. 113, 283; 4 L. 328; 19. L. 429.

We think it clearly results from these principles that the general denial filed by the heirs and widow in community (being capacities cre-

ated by law) did not put plaintiff on proof of such capacities, which, not being specially denied, were admitted.

3. Ricks, and the estate of Varnado, represented by the widow and heirs, are sued as co-trespassers and solidary obligors. To the extent that the estate of Varnado is liable, the judgment against it would be solidary with that against Ricks, but would divide itself as follows: one half against the widow, and one half against the two heirs jointly.

4. It is said the damages awarded are excessive. The evidence discloses a most cruel, unmanly, and wanton outrage, perpetrated by the deceased, Varnado, and Ricks, upon the defenseless wife and children of plaintiff, who were ejected at night from their home, and their household goods thrown out of doors, during plaintiff's absence from home. It is unnecessary to go into particulars. So far as Ricks is concerned, we shall not disturb the verdict of the jury, who awarded \$5000 damages against him. But we have seen that the widow and heirs of Varnado are not liable to the infliction of these exemplary and punitive damages, but only for civil reparation. The evidence as to the actual damages done is not very satisfactory or definite, but we think it better that we now decide the whole case. We think that three hundred dollars would cover the actual loss of plaintiff resulting from the wrongful acts complained of, and will give judgment against the widow and heirs of Varnado for that amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, as relates to the defendant, Ricks, be affirmed, with costs of both courts. That said judgment, as against the widow and heirs of Varnado, be amended, and reduced to three hundred dollars (*in solido* with the judgment against Ricks). Said three hundred dollars to be paid, one half by Dicey Varnado, and one half by Celia and R. Scott Varnado, jointly. That the costs of the court below be paid by the defendants, and the costs of appeal as to said widow and heirs be paid by plaintiff. That said judgment as thus amended be affirmed.

No. 7033.

LEOPOLD DE PORET VS. A. L. GUSMAN ET AL.

A non-resident debtor sued in this State and personally cited, may have a personal judgment rendered against him for the whole debt due by him.

A power of attorney authorizing an agent to sue for a specific debt, and to do all in the premises that the principal could do, carries with it the power to make the suit effective by attachment.

No act done, or declaration made by an agent in his individual capacity, and unauthorized by his principal, can estop him from doing any thing he is authorized to do as agent.

A creditor's oath to the fact alone of the non-residence of his debtor, gives him the right to attach the latter's property. He need not swear that the debtor "can not be cited."

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

*Favrot & Lamon and I. & G. W. Burgess* for plaintiff and appellee.

*E. W. & S. M. Robertson* for defendants and appellants.

The opinion of the court on the original hearing was delivered by **SPENCER, J.**, and on the rehearing by **MANNING, C. J.**

**SPENCER, J.** This suit is brought by, and in the name of, Leopold DePoret against A. L. Gusman, Mrs. Zoe Garig, and Mrs. Zulme Hearsey, the simple and unconditional heirs of Gabriel Gusman, deceased. A. L. Gusman is a citizen and resident of New York, but was in East Baton Rouge at the time of the institution of this suit, and was personally cited.

The petition alleges his citizenship in New York, and that he is about to convert his property in Baton Rouge into money, in order to put it beyond the reach of his creditors, and, therefore, prays an attachment. The affidavit for attachment and the bond were made by one of the defendants, Mrs. Hearsey, as the agent and attorney in fact of DePoret, the plaintiff, under a special power of attorney, which is produced.

The plaintiff's claim against Gabriel Gusman, and, therefore, against his said children and heirs, is based upon—

1. An act of partition made August 25, 1866, among the heirs of Esther DePoret, in which Gabriel Gusman appeared as the agent and attorney in fact of plaintiff, one of the heirs, and received for him the sum of \$2577 93½. In this act, Gusman explicitly declares himself the agent and attorney in fact of Leopold DePoret, "by virtue of an act of procuration of record, in book V of notarial acts of the city of Baton Rouge," etc.

2. An act of sale by Gusman, as agent aforesaid, of date January 9, 1871, of certain real estate belonging to his principal, in which he acknowledges to have received \$648 in money and notes.

In the face of these acts and the evidence in this record, it is idle to attempt to dispute the receipt of these sums by Gabriel Gusman. The testimony of the defendant, A. L. Gusman, himself, who most strenuously contests this suit, shows that his father's own books disclose its receipt. Nor is there, so far as we can discover, the slightest evidence that he ever paid it over to plaintiff. His books, it seems, contain a statement that he remitted a bill for \$2500 to plaintiff at Paris, but it was returned to him, as the plaintiff could not be found. The plaintiff voluntarily remitted all claim for interest on these sums up to 17th February, 1873, the date of Gabriel Gusman's death, because, we presume, no demand had ever been made on him for the money by DePoret.

It is unnecessary to notice defendants' bill of exceptions to the introduction of the power of attorney from plaintiff to Gusman as being the copy of a copy, since the act of partition contains ample proof of the agency, and even specifies the book in which the mandate is recorded.

On the merits of the case, the existence and justice of this debt, there can be not the slightest doubt. In fact, each and every one of these heirs, and especially A. L. Gusman, are estopped from denying it. They over and again, in their transactions about this estate of their father, admitted its existence, and even set apart property to sell to pay it.

But it seems that Mrs. Hearsey, one of the heirs and a defendant herein, in the course of these attempted settlements of the father's estate claimed that she was owner of these claims—that DePoret, the plaintiff, had given them to her—and in certain suits between her and her co-heirs she swore that she owned them, and A. L. Gusman swears that on one occasion she exhibited to him a paper which she said was evidence of the gift, but she did not let him read it. These declarations were made in 1873, and even as late as May, 1874. The present suit was brought by DePoret in September, 1874, and the power of attorney under which Mrs. Hearsey made the oath and gave the bond for attachment bears date in France, November, 1873.

In the present suit, September, 1874, she swears that DePoret is the owner. She has certainly by her conduct, averments, and oaths placed herself in a position that needs explanation. She is a co-defendant in this suit, and yet appears as agent of the plaintiff, in swearing out an attachment against her brother and co-defendant, A. L. Gusman. True, this is a suit against joint heirs, for their *virile shares* of a debt of the ancestor, and might have been brought against each one separately. See Acts of 1871.

If it were made to appear that her co-defendants had been prejudiced in their defense by this conduct of hers, we should be indisposed to tolerate it. But, as we have said, there is no doubt of the correctness of this claim. The only objection ever made to it was to the interest, as

no demand had been made, and Gusman's books showed an effort to pay it, or at least part of it. But this objection has been removed by the remission which has been made of all interest prior to Gusman's death.

It is not for us to reconcile Mrs. Hearsey's inconsistencies. If she were ever the owner—if DePoret ever in fact gave or promised to give her these claims—still it is true that at the time this suit was instituted she disavows it and swears that DePoret was the creditor; and as we do not perceive that the defendants, A. L. Gusman and Mrs. Garig, have any real defense to the claim, in any body's hands, we do not think the question material. At all events, there is no proof binding on DePoret that he ever parted with his undisputed ownership. Mrs. Hearsey's declarations in her own name and interest, and for her own purposes, out of the presence of DePoret, that he had given them to her, certainly can not be held to have divested him of his rights.

We, therefore, hold that so far as this record discloses, DePoret is still the creditor, and is not estopped or barred from asserting his rights by Mrs. Hearsey's declarations and acts. The fact that in November, 1873, DePoret executed a power of attorney to her as his agent to sue for and collect this very debt, is evidence that he then considered himself the creditor, although even after the receipt of this power it seems that Mrs. Hearsey continued for some months to assert her ownership.

We repeat that the debt is fully established against Gabriel Gusman, and as it is admitted that the defendants are his pure and simple heirs judgment was properly rendered *in personam* against each for their virile share. We can not assent to the proposition of defendants' counsel that the suit against A. L. Gusman, being by attachment, the whole proceeding falls as to him, if the attachment be set aside. He was a non-resident of the State, temporarily in Baton Rouge, where the succession of his father was opened, and was personally cited. A party having no residence or domicile in the State may be cited wherever found, and, upon such citation, may be *personally* condemned. C. P. 165, No. 5.

A. L. Gusman, however, contends that the attachment of his property was illegal—

1. Because the power of attorney under which Mrs. Hearsey acted was insufficient.

2. Because Mrs. Hearsey was estopped from making the affidavit, etc., as agent of DePoret, because of her previous contradictory judicial admissions and sworn declarations anterior and subsequent to the date of the said power.

3. Because the allegation that he was about to convert his property, etc., was false, and because the other allegation that he was a citizen of



New York and non-resident of this State was insufficient of itself to warrant the attachment.

4. Because DePoret was not the owner of the claims, etc. This last ground we have already considered in connection with the merits, and it need not be further noticed.

1. As regards the sufficiency of the power. It appoints Mrs. Hearsey agent and attorney in fact "for me and in my name and stead, to ask, demand, sue for, recover, and receive all such sums of money, debts, goods, rents, dues, and accounts, \* \* \* \* as shall be due, owing, payable to, belonging to or detained from me, giving and granting unto my said agent my full and whole power, strength, and authority in all matters pertaining to the several successions of Esther Mainville, Esther DePoret, and Gabriel Gusman, deceased, to sue for and receive the amount for me drawn by my representative, Gabriel Gusman, in the lawful partition of August 25, 1866, and to recover the value or possession of the lot, etc., known as "Hall's Row," received and invested by my aforesaid representative, with all interest, etc., \* \* \* and I hereby empower my said agent \* \* \* \* to do all and every other act or acts, thing or things, etc., which may be needful and necessary in the premises \* \* \* \* as fully to all intents and purposes as I might or could do, if personally present," etc.

We think that this power specially authorizing the agent to sue for these specific debts, and to do all and every act and thing in the premises which the constituent could himself do, carries with it the power to make that suit effective by attachment, if deemed necessary. It is a much stronger case than that of *Dwight vs. Weir*, 6 A. 706. Upon the authority of that case, and of *Fulton vs. Brown*, 10 A. 350, as well as upon the terms of the instrument, we think the agent was authorized to sue out the attachment in this case.

2. As to Mrs. Hearsey being estopped from making the oath and giving the bond, etc., in this case, as agent of DePoret, we are unable to see in what way her acts, done in her own name and for her own interests and purposes, can be pleaded as an estoppel of DePoret. This suit is brought by DePoret, who shows by authentic evidence his right to the money sued for. Can the unauthorized assertion by her, out of his presence, of the ownership of his rights, divest him of them?

The case of *Gilbert vs. Hollinger*, 14 A. 441, was where plaintiff's agent in a suit in the United States court swore out an attachment under allegations that the defendant resided in Louisiana, and then voluntarily abandoned and discontinued the suit, renewing it on same day in the State court under allegation that defendant resided in Alabama. In both cases *he was acting as agent*, and under the rule *qui facit per alium facit per se*, the court properly held that the plaintiff

could not maintain his attachment in the face of these his contradictory allegations. So, in the case of Howell, Tax Collector, vs. The Sheriff, 27 A. 701, had the *second* suit been a contest between the State and the seizing creditor, can any body suppose that Howell's declarations in the *first* suit, wherein he claimed the property in question as his own, would have estopped the State from asserting its ownership and proving it, if need be, by Howell himself? The doctrine of estoppel by the acts or declarations of an agent, must, in the nature of things, find its application only when those acts and declarations were done or made by the *agent as such*. In the case before us the acts and declarations of Mrs. Hearsey pleaded in estoppel were not done or made *as agent of Poret*, but avowedly in her own name, interest, and behalf. We can not see that they prevent her, *as his agent* in this suit, verifying his allegations by her oath. Besides, there is not necessarily any inconsistency in her claiming to be owner of a *chose in action* in January or February, and afterward, in September, swearing that another person was then owner of it. Both statements might be true.

3. Article 240 C. P. enumerates the cases in which attachments will lie. The second one is "when the debtor resides out of the State." The mere fact of non-residence gives the right of attachment, even when the debtor is present in the State. 1 N. S. 412 ; 18 A. 526, 305. But the counsel contends that article 240 is modified by article 243, and that the words "so that citation can not be served on him," refer to and qualify, not only the preceding words "conceals himself," but also the words "resides out of the State," so that in the counsel's view it is not sufficient to swear that "the debtor resides out of the State," but also that "he can not be cited." This is an error, and will be manifest by a simple comparison of the two articles. Article 243 simply repeats the provisions of article 240, which in its third paragraph gives attachment "when the debtor conceals himself to avoid being cited," etc. Article 243 repeats when the debtor "conceals himself so that citation can not be served on him."

The court below gave judgment for plaintiff for the amounts claimed, with interest, from 17th February, 1873, at five per cent, and maintaining the attachment against A. L. Gusman. We think the judgment is correct, and it is, therefore, affirmed at the costs of appellants.

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ON REHEARING.

MANNING, C. J. We are not disposed to change our decree previously made, as upon re-examination we think it correct. Therefore

It is ordered and adjudged that our former decree remain undisturbed.

No. 7008.

J. MAT. WELLS, JR., EXECUTOR, VS. F. M. AND IDA WELLS.

30	935
49	582
30	935
113	52

One who holds as owner peaceable, public, and uninterrupted possession for ten years of an immovable which he has acquired from one whom he honestly believed to be the real owner, under a title translatif of the property, acquires by prescription the legal ownership of the immovable.

Whoever alleges bad faith in the possessor of property who claims a title to it by prescription, must prove the bad faith.

The universal legatee of a succession who has accepted the same, and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without any order of court authorizing her to act.

**A** PPEAL from the Ninth Judicial District Court, parish of Rapides.  
*Hunter, Judge ad hoc.*

*R. J. Bowman* for plaintiff and appellant.

*James G. White* for defendants and appellees.

The opinion of the court was delivered on the original hearing by SPENCER, J., and on the rehearing by MARR, J.

SPENCER, J. Walter O. Winn died in 1860, without ascendants or descendants. By olographic will he left his wife, Mary E. Winn, universal heir and legatee, and appointed her executrix. This will was duly probated, and she qualified as executrix. His estate was worth about half a million of dollars, and his debts about \$120,000. The widow took possession of the estate, and seems to have dealt with it pretty much as her own from the death of her husband in 1860 to 1870, when her attorney filed what purports to be an account of her administration.

In the fall of 1862 she sold to E. M. and Jefferson Wells, for \$20,000 cash in Confederate money, one fourth interest in the Lodi plantation in Rapides parish. The sale was one by public act, and duly recorded, and the purchaser went into immediate possession. In 1864 E. M. and Jeff. Wells transferred the property so acquired to their wives, the defendants, as a *dation en paiement*, by public act. In 1874 the public buildings and offices of that parish were destroyed by fire, and we have only secondary evidence of the contents and nature of this title from Mrs. Winn to the vendees aforesaid. The present suit is brought by the plaintiff as public administrator and dative executor of Walter O. Winn, the widow having been destituted by decree of court. The object of the suit is to recover and restore to the estate of Winn the fourth of said plantation so sold, and to annul the act of sale thereof, as having been made by the executrix without authority of law.

The defense is that Mrs. Winn was the universal heir and legatee; that she accepted the succession unconditionally, disposed of its effects as owner, and that thereby the estate of Winn ceased to exist and was

lost by confusion in that of the heir. Finally, the defendants plead the prescription of ten years.

Under the view we have taken of the case it will be unnecessary to decide the question whether a sole heir or universal legatee, who has been named, appointed, and qualified as executor, can by extra judicial acts of unconditional heirship, and without having previously provoked his discharge as executor, terminate the existence of the succession of which he is heir and executor.

We think that under the proofs in this record the plea of prescription must prevail. In determining this question it is matter of no moment whether Mrs. Winn was or not owner in law or fact; nor whether in law or fact she had a right to sell this property. If prescription could only be pleaded in favor of a party who had acquired from the *true* owner, or one having legal authority to sell, it would be a very useless right. The very object of this prescription is to quiet the titles of those who may have acquired from persons not owners, and having no right to sell; "as happens to him," says article 3451, C. C., "who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." Again, article 3450 says: "By the term *just title* in cases of prescription we do not understand that which the possessor may have derived from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property." Article 3485: "By the phrase *transfer the property* we understand not such a title as shall have really transferred the property, but a title which by its nature would have been sufficient to transfer the property, provided it had been derived from the real owner, such as a sale, exchange, etc." So that the questions in this case are not whether Mrs. Winn was the owner, and had the right to sell the property, but whether the purchasers at the time of buying believed that she was owner, and whether the attempted transfer was sufficient in *terms and of nature* to transfer the property had it emanated from the true owner? If so, and if the defendants have possessed as owners under such transfer, peaceably, publicly, continuously, and unequivocally, for ten years before this suit was brought, the prescriptive title is complete. See C. C. 3453.

There is no doubt that Mrs. Winn did in 1862, by public act duly recorded, sell and deliver to the defendants, E. M. and J. Wells, the land in controversy, at the price of \$20,000 cash. Both vendees swear that they *bona fide* believed her to be absolute owner, and knew nothing of her holding the position as executrix of the deceased husband, of whom she was heir. That she treated the property as her own, and sold it to them as her own, and that they and their vendees have had

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Wells vs. Wells.

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peaceable, public, continuous possession as owners ever since. Their evidence is, we think, in the main corroborated by that of Judge Ryan, who has for years, in fact since Winn's death, been the attorney of the succession. There is no proof to the contrary of these statements. There is no evidence to show that E. M. and J. Wells at the time of their purchase knew that Mrs. Winn was executrix. It matters not what they knew afterward, since "it is sufficient if possession has commenced in good faith." C. C. 3448. "Good faith is always presumed in matters of prescription; and he who alleges bad faith in the possessor must prove it." C. C. 3447.

Citations were issued and served in this suit in April, 1876, more than thirteen years after the date of the sale in question. The judgment below maintained the defendants' title, and is, we think, correct.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

The Chief Justice declined taking any part in the decision of this cause.

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ON REHEARING.

MARR, J. The testimony in the record satisfied us that the title under which defendants hold the real property in question was protected by the prescription of ten years; and we affirmed the judgment of the district court in their favor, on that ground alone, pretermittting the expression of any opinion as to the right of Mrs. Winn, as executrix and universal legatee under the will of her husband, to dispose of the property belonging to his succession by private sale.

It seems that we were in error as to date of the death of Walter O. Winn, which actually occurred in 1861, instead of 1860. This is not material, because the sale under which defendants claim was made in 1862; and they were cited in this case in April, 1876. We do not propose to re-examine the question of prescription; because no suggestion has been made which induces us to doubt the good faith of the authors of the title of defendants: and for the additional reason that we think their title is not dependent on the lapse of time.

The will on which the rights of Mrs. Winn depend is as follows:

"I, Walter O. Winn, make this my last will and testament; I appoint my beloved wife, Mary E. Winn, my executrix and universal legatee. I leave to her all the property, real and personal, of which I may die possessed, or own."

There were no forced heirs, and no particular legatees; and by the terms of the Civil Code, in such case "the universal legatee by the death of the testator is seized of right of the effects of the succession,

without being bound to demand the delivery thereof." Article 1609 (1602).

It is true one can not be held as heir, whether legal, *ab intestato*, or instituted by will, without having accepted that quality; but it is equally true that this acceptance may be either express or tacit. It is equally obligatory and effectual in the one case as in the other.

"It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

"It is tacit when some act is done by the heir which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." R. C. C. article 988.

Shortly after the death of her husband, Mrs. Winn disposed of certain slaves of the succession by exchanging them for others. As heir, universal legatee, she had a perfect right to do this; as executrix, she could have done no such thing. In 1862 she sold the real property in question by notarial act to the authors of the title of defendants. As heir, universal legatee, absolute owner under the will, she had a perfect right, full power to do this; as executrix, she had no such power. During the war Mrs. Winn removed from Rapides parish to the State of Texas, with the slaves and movable effects of the succession, and did not return to Louisiana until after the close of the war. As executrix, she could not have been permitted to take any part of the property beyond the limits of the jurisdiction of the probate court, certainly not beyond the limits of the State; as heir, owner, she could do what she pleased with her property.

On the return of Mrs. Winn from Texas suits were brought against her, in one of which, at least, that of Gasquet, she was charged as heir, universal legatee, and as having accepted, purely and simply; and in that quality judgment was rendered against her. This was the acceptance of the quality of heir in a judicial proceeding. In 1867 Mrs. Winn made a donation to her mother of a plantation which belonged to the succession; and about that time she married, and removed to another State with her husband.

In his reasons for judgment, the judge *ad hoc* states that the only voluntary appearance of Mrs. Winn, and acknowledgment of her capacity as executrix, was in 1870, when a petition was presented by her, or in her behalf, for the sale of certain lands of the succession in Madison parish.

In 1869 her attorneys filed a tableau of debts, at the instance of a creditor; and in 1874 proceedings were instituted to destitute her. She was destituted of her office as executrix by decree of this court in 1875, upon the grounds that she had sold the property in question in the

year 1862; and that she had ceased to be a resident of the State. She was represented in that case by a curator *ad hoc*; and it does not appear from the report that the court considered or passed upon the fact that she was universal legatee.

The acts of Mrs. Winn are not equivocal; but when we consider that the succession of her husband was estimated at over \$500,000, and the debts amounted to only about \$125,000, there can be no doubt as to her intention. All her dealing with this succession shows, beyond doubt, that she had unqualifiedly, in authentic acts, and in judicial proceedings, accepted the quality of heir; and she could not have resisted the demand of any creditor against her personally as heir.

In *Duplessis vs. White*, 6 A. 514, the executrix, who was also sole heir of the testator, sold real property of the succession at private sale. The court said: "Nothing prevented her from accepting the succession purely and simply, and at once taking possession as heir. The fact of her selling the property in that capacity amounts to such an acceptance; and the mention in the act that she was executrix was immaterial, and affected neither her rights nor her obligations as heir, pure and simple."

The case of *Bird vs. Succession of Jones*, 5 A. 643, is wholly different. By her will Mrs. Jones directed: 1. That all her just debts be paid, "and if any thing be left, I desire it to be disposed of as follows: 2. I give and bequeath to Boswell Henderson Jones all the property which by law I have a right to dispose of, and make him my universal legatee. 3. I appoint Boswell Henderson Jones my executor \*  
\* \* and give him seizin of my estate; and request him to see that the intentions herein expressed be carried out."

Jones qualified, and he compromised with the forced heirs. One of his creditors sought to subject the property of the succession to the payment of the debt. Jones answered that he had taken possession as executor, and held the property with the intention of paying the debts, and well knowing that only the residue after such payment belongs to him.

It is clear that he did not intend to accept as universal legatee; that he intended to administer as executor, and to pay the debts of the succession as he was charged by the will to do; and that he could not have acquired any right or title as universal legatee except to such residuum as might be left after paying the debts of the succession, the first charge imposed upon him by the will, the injunction with which it closes.

It is therefore ordered that our decree heretofore pronounced in this case on the seventh March, 1878, remain undisturbed; and it is affirmed.

The Chief Justice recuses himself.

Even in cases when a married woman has executed her note and mortgage on her property to secure it, under the authorization of the judge, she may prove by parol evidence that the note and mortgage were obtained by fraud, and that their consideration was a debt of her husband.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*H. D. & Chas. G. Ogden* for plaintiff and appellee.

*Cotton & Levy* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant is sued upon a promissory note and mortgage given to the plaintiff, as stated in the public act of mortgage, for the "amount of a loan in lawful current money of the United States, now made to her." The necessary authorization of the judge to her, as a married woman, to make the loan and mortgage was procured and appears in evidence annexed to the copy of mortgage. The defense is that no loan was in fact made as stated in the mortgage or under the authorization, but that defendant was induced in error of fact and through the fraud and misrepresentation of her deceased husband, and of the plaintiff, Barth, to sign the note and mortgage without knowing what they contained till long afterward, during the last illness of her husband. That in fact they were without consideration as to her. That she received no money as stated in the mortgage, and that the real consideration for the note and mortgage was an antecedent debt of her husband to Barth, and that they were, therefore, given "*in fraudem legis*," and are null and void and without obligation upon the defendant. She offered to prove the facts set up in the answer on the trial by her own testimony and that of several other witnesses, all of which was objected to by the plaintiff's counsel upon the ground that the statutory authorization of the judge had been obtained, whereby the act of mortgage had the same effect as if made by a "*feme sole*," and made full proof against her, and that no parol evidence could be received to contradict or vary the act of mortgage, or of what might have been said before or at the time or since the signing of the act. The objections were sustained and defendant's counsel excepted.

This presents the sole question necessary for our consideration in the case. It is conceded by both counsel that prior to the act of 1855, now embodied in the Revised Statutes and Revised Civil Code of 1870, the burden of proof to bind the wife would have been upon the plaintiff, and it is further conceded by defendant's counsel that under that statute where the judge's authorization has been obtained as required by the



statute, the burden of proof rests on the wife to show that she is not bound for some legal reason. We think this view of the law is correct. In *Conrad and Husband vs. LeBlanc, Sheriff, et al.*, 29 A. 123, we held that where the judge's authorization was had authorizing the wife to execute a mortgage for a certain sum and purpose, and it was executed for a different sum and for some other purpose, it did not come within the statute nor relieve the creditor from the burden of proof when the facts appeared on the face of the mortgage. In a more recent case of *Claverie vs. Gerodias and Husband*, 30 A. 291, where the authorization was obtained and the mortgage on its face executed in accordance with it, we held the wife not bound by the note and the mortgage upon proof of fraud and collusion, and that the purpose of the mortgage was really to secure a debt of the husband or of the community, and the mortgage note so given was null and void in the hands of the mortgagee. It will hardly be pretended that a "*feme sole*" would not be allowed to avoid the effect of a similar note and mortgage to those here sued on on the ground of error and fraud, or that she would not be allowed to make proof of the fraud "by simple presumptions, by legal presumptions, as well as by other evidence," to use the language of the law, C. C. art. 1848, (formerly 1842). It would be indeed singular if a married woman, who by the terms of the statute is placed upon the same footing as a *feme sole*, should not be allowed to make similar proof. The terms "full proof" in the statute must be construed with reference to its objects and other provisions and language, and when the judge's authorization has been obtained it does make that proof, so far as to place her as a *feme sole* and to hold her bound like any other person, but no more and no farther. Fraud vitiates the most solemn contracts, and when directly attacked on that ground, parol or other evidence may be received to prove it, as has often been decided, otherwise there would be no relief. See 5 R. 354; 4 L. page 348; 2 A. 93; 5 A. 572; 16 L. 311, as to parol evidence to prove error. See, also, 10 A. 515; 13 A. 207, *Montgomery vs. Chaney*, to the effect that under a charge of fraud all the facts and surrounding circumstances attending the transaction may be proved by parol evidence. It may be that the defendant might be able to show that the note and mortgage sued on were not given in accordance with the judge's authorization, and if so, we know of no law or principle to prevent it as against the mortgagee. The books are full of cases in which married women, prior to the statute of 1855, and since when it was not invoked, have been allowed to prove that obligations contracted by them in the most solemn form and with the fullest acknowledgment of separate benefit from the debt or obligation, were in fact for the debts of the husband or of the community, and to be consequently discharged. It is not then the form of the evidence of the debt which controls the

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Barth vs. Kasa.

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matter of proof and the means of evidence. It is the disability of the party, the wife, under the law to enter into the contract "*in fraudem legis*." The legal effect of the statute under consideration is to shift the burden of proof where it is complied with, and not the means or character of evidence. If, indeed, the debt for which the note and mortgage were given was that of the husband, it was "*in fraudem legis*," and may be shown by any competent evidence. If it was so, it is not protected by the statute, because not contracted in accordance with it. The fraud may have been perpetrated even after the authorization in the passage of the act itself for another and different purpose, as we have already seen was done in two cases cited. The defendant should have been permitted to prove the allegations of her answer. The evidence was improperly rejected.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and the case remanded to be proceeded with according to law and this opinion, and that plaintiff and appellee pay costs of appeal.

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No. 7106.

THE STATE VS. WILLIAM VON SACHS ET AL.

The statement made by an accused, while in prison on the charge of larceny, to the officer in charge of him, that "if you, (the officer), will take me out of jail, I'll turn up the money," is not admissible in evidence against the accused.

**A** PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

*H. N. Ogden*, Attorney General, for the State.

*Simeon Belden* for defendant.

The opinion of the court was delivered by

EGAN, J. This is a prosecution for grand larceny. The accused, Von Sachs, was found guilty and sentenced to seven years imprisonment in the Penitentiary. The only question for our consideration is presented by a bill of exceptions to the reception in evidence of a statement or confession made by the accused while in prison under this charge, to one of the officers, to this effect, "If you will take me out of jail, I'll turn up the money." The bill states that this was "part of a confession made by the accused, drawn out by the hope and offer on the part of the witness to assist him if the money could be found through him," which had been ruled out by the court. The judge states "that he refused to consider this statement as a confession implicating the accused under the charge for which he was being tried—grand larceny—as it was possible that the accused might have knowledge as to the

whereabouts of the stolen property without having had any connection with the theft, and that his statement was no admission by the accused that he had committed the theft." It may be very true that the statement of itself was not a *direct* and circumstantial admission that the accused had committed the theft, but when we consider that he was then confined under a direct charge of having committed it, the admission would necessarily be viewed very differently from the same statement made by one not suspected or charged with the larceny. That it was considered as having an important bearing upon the guilt of the accused is manifest from the State having offered it in evidence on the trial, and that it may have been so considered by the jury and therefore have had an important bearing on the question of the guilt or innocence of the accused, who was charged with the larceny, among other things, of two hundred and fifty dollars in United States currency, is not only probable, but very natural. We think that the statement or confession made under such circumstances should not have been received, as it comes within the prohibitions of the law. 1 Greenleaf's Ev. §219, *et seq.*, title Confessions; State vs. Garvey and Earle, 25 A. 191.

It is therefore ordered and decreed that the verdict and sentence appealed from be and they are set aside and avoided, and the case remanded to the court *a qua* to be further proceeded with according to law and this opinion.

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No. 6694.

THOS. E. HELM ET AL. VS. MEYER, WEIS & Co.

A consignee who has made advances on cotton shipped to him has a right of pledge on it, and its proceeds, for the re-imbusement of those advances; and until the debt due for those advances is paid, he is not bound to accept, or pay any drafts drawn on him by the consignor against said cotton, at, or about the time it was shipped, in favor of a third person who had discounted the drafts for the consignor, and thus enabled the latter to buy the cotton shipped to the consignee. In the absence of any express or implied agreement, a party is not compelled to pay a draft drawn on him merely because he has been in the habit of paying similar drafts.

It is not necessary to record a pledge to make it effective as to third persons, where the object of pledge comes into the actual possession of the pledgee before any conflicting lien has attached to it.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

*Merrick, Race & Foster* for plaintiff and appellee.

*B. F. Jonas* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. In the spring or early summer of 1876 the firm of D.

Hiller & Co., of Canton, Miss., being largely in debt to Meyer, Weis & Co., of New Orleans, sent an agent or partner to New Orleans with instructions to negotiate a further advance of \$2000 by Meyer, Weis & Co., to enable said firm of Hiller & Co. to go on with its business. This agent or partner, Levy, effected an arrangement with Meyer, Weis & Co. to this effect, to wit: That Meyer, Weis & Co. would advance D. Hiller & Co. \$2000 additional, taking their note, due December 4, following, and secured by the note of one Keiffer, due in February following, for same amount, as collateral; said D. Hiller & Co. promising to ship cotton to sufficient amount on or before maturity of said note, and during the season, to cover it, they having the privilege of drawing for cotton purchases on Meyer, Weis & Co. from time to time, against the cotton shipped, but to leave margins sufficient to meet the said advance of \$2000 on or before its maturity, December 4, 1876. From August, 1876, to January, 1877, many shipments were made, and many drafts drawn by Hiller & Co. on Meyer, Weis & Co. These drafts were fifty-seven in number, and were all drawn in favor of Helm's Bank, of Canton, which was induced, as its cashier swears, to cash all these drafts of Hiller & Co. upon their representation that Meyer, Weis & Co. had agreed to pay all drafts drawn by them in favor of said bank for cotton bought and consigned to Meyer, Weis & Co.

On January 11, 1877, Hiller & Co. shipped from Forrest, Miss., eight bales of cotton; on January 12, from same place, one bale cotton, and on January 16, from same place, seventeen bales of cotton; in all twenty-six bales. These shipments were for account of the shippers, and consigned to Meyer, Weis & Co. On January 11, Hiller & Co. by letter advised Meyer, Weis & Co. of the shipment of the first nine bales, and on the sixteenth January by another letter they advised the shipment of the seventeen bales. In these letters there is nothing said of any draft being drawn against said shipments. But on the eighteenth January, Hiller & Co. drew a draft on Meyer, Weis & Co. in favor of Helm's Bank for \$1540, and in a letter of that date say they inclose bills lading for the twenty-six bales shipped from Forrest for their own account, and advise that they have drawn said draft against said shipment.

Meyer, Weis & Co. received and sold the cotton, but refused to pay the draft drawn against it. Thereupon, plaintiff brings this suit, alleging in substance, first, that there was an express agreement between Meyer, Weis & Co., Hiller & Co., and the bank that the former would pay all drafts drawn by Hiller & Co. in favor of the bank for purchase of cotton. Second, that having been advised by letter of January 18, inclosing the bills of lading, of the drawing of said draft on the proceeds of said cotton, the receipt and sale of the cotton was an implied acceptance of and promise to pay the draft. Third, that Hiller & Co.

having paid for the cotton with the money received on the draft, Meyer, Weis & Co. are liable for money had and received for their use, etc., and, fourth, that the bank took the draft entirely on the faith and credit of Meyer, Weis & Co., who had always paid promptly the drafts of Hiller & Co. for like purposes.

The defense is a general denial, and that defendants had the privilege of factor and consignee upon said cotton, to secure the advances made upon it as well as the amount due as balance on previous account.

As regards the first proposition of plaintiff, that there was an express agreement between Meyer, Weis & Co., Hiller & Co., and the bank, it is certainly not sustained by the evidence, which conclusively shows that Meyer, Weis & Co. knew nothing about Helm's Bank; that in the arrangement with Hiller & Co. nothing was said about it, or concerning it. We are satisfied that Meyer, Weis & Co. made no such agreement. Levy, the agent of Hiller & Co. in effecting this arrangement with Meyer, Weis & Co., swears there was no mention of Helm's Bank. Keiffer, the surety of Hiller & Co., states the same; Meyer and Weis the same. The only witness who swears that there was such an agreement is Daniel Hiller, who was not present when the arrangement was made with Meyer, Weis & Co. by Levy, and is evidently swearing recklessly. The cashier of the bank swears that Hiller *told him* there was such an agreement, but knows nothing of his own knowledge. There is no doubt that Hiller so informed the cashier, but that does not bind Meyer, Weis & Co.

Second. As to the implied promise resulting from the acceptance of the consignment, and the sale of the cotton.

There can be no doubt of the correctness of the general proposition that a consignee who accepts a consignment, with the advice and notice that the consignor had drawn on him for a stated amount against the goods consigned, impliedly promises to accept and pay the draft, and on refusal may be sued as for breach of contract. But that is not the case here presented. There are other circumstances which we think render that rule inapplicable.

In the first place, Meyer, Weis & Co. had advanced \$2000 to Hiller & Co. on the promise of re-imbursement by those shipments of cotton during the season. In the second place, those shipments were made "for account of the consignor," without qualification. In the third place, the shipments were made on the eleventh, twelfth, and sixteenth January, and *letters of advice* of these shipments, dated January 11 and 16, were forwarded, and still no mention of any drafts against them. It was only on the eighteenth of January that the draft was drawn, and a letter written advising it, and inclosing bills lading (which for aught that

appears may have been duplicate bills). In the fourth place, article 3247 of the R. C. C. provides that "every consignee or commission agent who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of these advances \* \* \* on the value of the goods if they are at his disposal in his store, or in a public warehouse, or if before their arrival he can show by a bill of lading, or *letter of advice*, that they have been despatched to him." Meyer, Weis & Co. had advanced \$2000 on these promised shipments; that advance was wholly unpaid; they had received letters of advice of the shipment before they had any knowledge of the draft. We think, too, that it fairly results from Meyer's testimony, and other circumstances, that they had received, also, duplicate bills of lading by railroad before those mentioned in Hiller & Co.'s letter of January 18. He says they received these bills of lading before the draft came to hand, and that the letters of advice of January 11 and 16 were the first received relating to twenty-six bales of cotton.

The privilege of Meyer, Weis & Co. as consignees and factors had, therefore, fully attached to this cotton, and Hiller & Co. could not thereafter defeat it by drawing drafts against the same. This view of the case renders unnecessary any discussion of the question as to how far a consignor who is indebted to consignee for advances on promised shipments of goods can while shipping *for his own account* encumber the goods by notice of drafts drawn against them. It is easy to see that this question is a very different one from that where this previous relation of debtor and creditor does not exist. It may well be doubted whether any thing short of negotiation of the bills of lading with the draft, or a designation in the bill that the shipment is for account of the holder of the draft, would defeat the privilege of the consignee for advances. But we do not find it necessary to pass upon this point, and, therefore, express no opinion upon it.

Third. Under the view we have taken it is matter of no moment whether Hiller & Co. paid for the cotton with money obtained from plaintiff or not. That fact, if true, gives no claim either upon the cotton itself, its proceeds, or upon Meyer, Weis & Co. If the cotton were in Hiller & Co.'s hands, it would not even give plaintiff a privilege upon it.

Fourth. As to the plaintiff's bank taking the draft upon the faith and credit of Meyer, Weis & Co., it is enough to say that that firm is not responsible for Hiller's misrepresentations, and that there is outside of Hiller's own testimony (which we do not credit) no evidence whatever of any act or declaration of Meyer, Weis & Co. to justify such faith and credit being given. The fact that they were in the habit of

paying similar drafts for Hiller & Co. could not, in the absence of an express or implied agreement, compel them to continue to do so.

In conclusion, it is manifest that there is no question here as to the necessity of Meyer, Weis & Co. recording their privilege; first, because plaintiff is not claiming the cotton itself, or any privilege upon it or its proceeds. Second, because Meyer, Weis & Co. have the cotton or its proceeds in their own possession, and if there is any claim against them, it is simply for an ordinary money debt.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now ordered that there be judgment for defendant, rejecting plaintiff's demands, with costs of both courts.

80	947
118	989

No. 6579.

#### SUCCESSION OF P. G. QUIN.

A judgment rendered by a court of competent jurisdiction, and where the proper parties have been duly cited, can not be attacked in any collateral way, even by third persons not parties to it.

A parish court is not competent to review, or reverse a judgment of the district court.

The proceeds arising from the sale of property belonging to the wife, collected by the administrator of the deceased husband, belong exclusively to her, and do not enter into the husband's succession.

**A** PPEAL from the Parish Court of St. Helena. *Duncan*, Judge *ad loc.*

*H. M. Wright* and *W. F. Kernan* for opponent and appellant.

*Jas. H. Muse* for Mrs. Quin, appellee.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by MARR, J.

EGAN, J. The opponents are both ordinary judgment creditors of the succession. Their oppositions are on several grounds, most of which relate to the management of the property of the succession by the administrator, and moneys paid by him, which the court *a qua* considered no longer open to inquiry or opposition, because protected by a judgment homologating a former account of the administrator, unappealed and unreversed. The opinion of the judge *a quo* shows an unusually careful and intelligent consideration of the whole case, and we are not prepared to differ from his conclusions in regard to the grounds of opposition referred to.

The principal ground of opposition by Mrs. Quin was that the administrator had failed to place her upon the account and tableau as a judgment creditor to the amount of \$2946 44, besides interest and

## Succession of Quin.

costs, to be paid concurrently with other judgment creditors. Harrell, himself a judgment creditor, opposes the allowance of this claim, invites the parish court in this proceeding to review the action of the district court which rendered the judgment, and seeks to contest in the parish court the right of Mrs. Quin to be allowed the amount claimed. It is not disputed that the court which rendered the judgment had jurisdiction, nor that there was a regular *contestatio litis* resulting in a judgment. It is, however, claimed that the debt was not due, and that the judgment against the administrator does not bind other creditors who may oppose its allowance in the probate court. The judge *a quo* overruled this ground of opposition, and in so doing, in our opinion, did not err.

In the Succession of Neal, 25 A. 125, the court held that a judgment not absolutely void can not be attacked collaterally—that the parish court can not review or reverse a judgment of the district court, and that it is without jurisdiction *ratione materiæ* when the matter in dispute exceeds five hundred dollars. If the judgment of Mrs. Quin was liable to attack or reversal, it was in another *forum*, where proceedings should have been instituted, and those in the probate court stayed to await their determination. No such allegation or attempt is shown in this case. See Succession of Bernard, 24 A. 402. Mrs. Quin's judgment should have been recognized, and placed as such upon the tableau and account, and the judge below correctly so ordered. Harrell alone appealed.

Mrs. Quin asked in the court *a qua* that she be allowed by privilege and preference one hundred and sixty dollars, the price of a horse, her separate property, sold by her deceased husband. This sum was not reduced into possession by the husband while living, but was collected from the purchaser by the administrator after the death of the husband. It formed properly, therefore, no part of the succession, but belonged to the wife individually. It should not go to swell the sum applicable to the payment of other creditors, but should pass, undiminished, directly to Mrs. Quin, whose fund it was.

In her answer to the appeal she so asks, and that the judgment of the court below be so amended, and in other respects affirmed, and it is so ordered, and that the costs be paid by the succession, except the costs of the opposition of S. S. Harrell, which are decreed to be paid by him.

## ON REHEARING.

MARR, J. A re-examination of this case has only served to confirm us in the opinion heretofore pronounced. Our former decree, therefore, remains undisturbed.



No. 5623.

## PEET, YALE &amp; BOWLING VS. NALLE &amp; CAMMAK.

A suit against a party for an amount due by a vacant succession, on the ground that the defendant had made himself liable by taking unauthorized possession of the effects of the succession with intent to convert them to his own use, is not a suit against the succession, and hence, none but a court of ordinary jurisdiction can take cognizance of it.

When there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised that year, the latter shall prevail.

It is not necessary that the person who has taken unauthorized possession of the effects of a vacant succession, or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted, and convicted of the offense, before a creditor of the succession can institute suit to hold the offender liable for the debt due him by the succession.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

*Thos. J. Semmes* for plaintiffs and appellants.

*James and Joseph Brewer* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs sue to compel the defendants to pay them an alleged debt of Edward Day of a little over one thousand dollars, the liability to pay which is charged to arise from the defendants having taken possession of Day's vacant succession, with the intent to convert it to their own use, and without being authorized to that effect.

A peremptory exception was filed for this;—that an action will not lie to render a party liable for payment of the debts of a deceased person, until such party shall have been convicted of having taken possession of the vacant estate of the deceased, without authorization, and with the intent to convert it to his own use. Another ground of exception, not made in the pleadings, but orally argued by the counsel on both sides, is that the Fifth Court has not jurisdiction because the claim is against a succession.

The purpose of the suit is certainly not the enforcement against a succession of an alleged claim. Its object is to compel living persons to pay the debt of one deceased, because they have taken possession of and appropriated to themselves, without leave of the court, all that would otherwise have been answerable to plaintiffs' claim. No court but one of ordinary jurisdiction could have cognizance of such a demand.

It will not do to say, that the plaintiff must establish his claim contradictorily with a succession, duly represented, before he can be said to have a valid one. If the defendant has, by his own act, unauthorizedly appropriated the vacant succession to himself, that act dispenses a creditor of the deceased from looking to the succession any longer for payment. His claim is now converted into a personal one against the

party appropriating the estate unlawfully, or rather, he has the option of thus converting it.

On the point of the necessity of a criminal prosecution and conviction preceding the civil suit, we are referred to three express adjudications and to the law in the latest revisal of the statutes. Our decision must depend upon the effect we shall give to a very remarkable change in the Civil Code made by the interpolation of a new article in 1870.

Prior to 1820, the liability of a person, who should convert to his own use the effects of a deceased person, was confined to the succession, which could sue the intermeddler in an action for damages for the injury to it. An Act of that year added another remedy by providing that the party, thus taking possession of a vacant estate, without authority, should be prosecuted, and on conviction should be fined, and moreover should be liable to pay all the debts of the estate, besides the damages suffered by parties. The language of this law is reproduced exactly in the Revised Statutes of 1856, p. 541, and in those of 1870, sec. 3685. And under that law, it has been uniformly held, that the criminal prosecution and conviction must precede the suit to enforce the civil liability. *McMasters v. Place*, 8 Annual, 431. *Walworth v. Ballard*, 12 Annual, 245. *Carl v. Poelman*, *Idem*, 344.

If the law had remained the same, we should adhere to that construction, although there can be no good reason why a party should be precluded from enforcing a civil liability, incurred by another because of an act, not criminal in its nature or essence, until those, who have in charge the administration of the criminal law, shall choose to prosecute him. The sections of the two revisals cited are under the head of successions, and do not appear among the crimes and offences.

But the decisive feature is that the Civil Code, as revised, contains a new article, manifestly designed to alter the law upon this very point, and wisely altering it, as it had been construed by this court. It enacts;—in case any person shall take possession of a vacant succession, or a part thereof, without being duly authorized to that effect, with the intent of converting the same to his own use, he shall be liable to pay the debts of said estate, exclusive of the damages to be claimed by the parties who may have suffered thereby. art. 1100.

Whenever there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised in that year, the latter shall prevail. Rev. Stats. sec. 3990. The new article of the Code is an exact copy of the law of 1820, as reproduced in the revised statutes of 1870, except that the word 'succession' is substituted to 'estate,' and the provision subjecting the intermeddler to a criminal prosecution is wholly omitted.

The counsel of the defendants insist that these two enactments are

not in conflict. They are in error. If it had been argued that the material change in the phraseology as it appears in the Code, does not necessarily repeal that part of the statutes which creates the criminal offence, there would have been good reason for that construction. The criminal offence may very well continue to exist. The statutes attach to its commission a two fold punishment, viz a fine, and a liability to pay debts and damages. The Code on the other hand retains the declaration of civil liability on the part of the intermeddler, and relieves it from the hampering restriction of a criminal conviction as a pre-requisite to its enforcement, which in truth had practically operated as an immunity to the intermeddler.

Whether on trial, the plaintiffs shall be able to sustain their allegations, so as to fix liability upon the defendants, is for future investigation. The exception is to the prematurity of the action, and should not have been sustained. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the cause is remanded, with instructions to the judge below to overrule and dismiss the exception of the defendants, and proceed to the hearing of the case, and that the defendants pay the costs of appeal.

No. 6670.

THE STATE vs. PAUL CLIFTON.

In an information charging burglary, and entering a house at night with intent to steal, it is not necessary to give the ownership of the house.

Evidence that the accused was seen in the immediate vicinity of the scene of the offense at about the hour he is charged to have committed it, is admissible.

The proper question to put, in order to elicit the reputation for honesty of an accused, is, what is the *general* reputation of the accused for honesty. etc.; not what is his reputation with those among whom he dwelt.

When the jury in a criminal case return a defective verdict, the judge may properly so state to the jury, and thereupon instruct them as to the form in which they should clothe their verdict. But to ask them the question whether it was their intention to find the accused guilty of the crime charged in the information, and to have recorded as their verdict the answer thus elicited, is so grave an interference with the functions of the jury, as will warrant the setting aside of the verdict.

**A**PPPEAL from the Superior District Court, parish of Orleans. *Whitaker, J.*

*H. N. Ogden*, Attorney General, for plaintiff.

*Robert Dalton* for defendant.

The opinion of the court was delivered by

*EGAN, J.* The defendant was accused, found guilty, and sentenced

for the crime of breaking and entering a dwelling-house in the night-time with intent to steal. From this sentence he has appealed. He objects that the information does not state the ownership of the dwelling-house. This was not necessary nor of the essence of the charge. The dwelling-house was sufficiently described as situated at and designated as No. 148 Canal street, and known as the New-Orleans Club-House and occupied by some person or persons to the district attorney unknown, "the said person or persons being lawfully therein at the time." This was sufficient description under the law, even if it be considered matter of substance and not of form or "description of something described in the information." The accused excepted to the reception of the evidence of a witness, Knapp, to the effect that about the hour of the night when the crime is charged to have been committed "he saw the accused in his own back premises." The judge states that the back premises of the witness immediately adjoin those of the New-Orleans Club-House, and that other witnesses had testified to the escape of the burglar from the rear of the Club-House premises to the rear of those of the witness, who had testified to hearing shots fired near by at the time, and that said witness was at the time of the objection about to testify to the arrest of the accused after the shooting (and at the hour the burglary was committed as stated by other witnesses) upon witness's premises or in the alley adjoining. The evidence was pertinent and properly received. On the trial the counsel for the accused asked a witness, Adeline Smith, with whom he boarded (and also another witness), "what was the reputation of the accused for honesty among those he dwelt with in her house." The proper question, if the foundation had been laid, which is not shown by the bill, would have been "what was the *general reputation* of the accused for honesty among his neighbors," and not what particular persons thought of him. The court did not err in excluding the testimony; a much more serious question is presented by the next and last bill of exceptions, which states that after the jury had deliberated upon the case for about two hours and a half they returned into court with their verdict—that they were asked by the judge if they had agreed upon their verdict, to which the foreman answered that they had, and handed it to the clerk, who was ordered to record it; when the counsel for the accused asked that the jury be polled, and while that was being done and before its completion the judge directed the sheriff to stop, and stated "that the verdict was defective, and would have to be changed," and then asked the jury through their foreman "if it was their intention to find the prisoner guilty of burglary with intent to steal, as charged. The jury, through their foreman, answering in the affirmative, *the court ordered the verdict to be changed and to be so recorded,*" and the judge then had the jury polled the second time; they, the jury,

then answered that was their verdict, and the court ordered the verdict to be recorded as so amended, to all of which the counsel for the accused excepted. The verdict of the jury as originally returned into court is not before us, and we can not, therefore, pass upon its sufficiency or responsiveness. The judge pronounced it defective, and we must assume that he was correct. We can not, however, go further and assume what was the character of the verdict. The verdict as it appears of record is "Guilty of burglary as charged, with intent to steal." While if the verdict as originally returned was defective it was perfectly proper for the judge so to state to the jury, and to instruct them anew as to the form in which they should clothe their verdict, it was not proper for him to ask the jury the direct question "if it was their intention to find the prisoner guilty of burglary with the intent to steal, as charged," *and to have recorded as their verdict the answer thus elicited.* Whatever the motive, and we have no doubt it was the best, this was trenching upon the province of the jury and in effect dictating to them their verdict, which in a matter so delicate and important to the liberty of the accused the law does not permit. We think, as before stated, that the proper course under the circumstances in an important criminal trial was for the judge to have informed the jury that their verdict as originally returned was defective or informal, and as to the proper form of verdict, just as though nothing had been returned into court by them as a verdict, and that after so instructing them they should have been directed and allowed to make up and return their own verdict, whatever it might be. A defective or informal verdict is no verdict, and the case stood in law just as it did when the jury originally retired to make up their verdict, and no other or different charge was permissible than would have been originally, save only that the judge *should* as before stated *have renewed* his instructions as to the form or language in which to clothe the verdict *in case the jury* should find the accused guilty or innocent. Such instructions are very different from a direct question from the court, "Do you intend to find the prisoner guilty of burglary with intent to steal, as charged?" and *especially it was not proper to have recorded as their verdict the answer so elicited.* However praiseworthy the intention of the judge, the language and spirit of our law guards too sacredly against any interference by the judge with the facts in a criminal case or any interference with the finding of the jury to permit the matter under consideration to be passed over as a simple irregularity and to grow into a precedent which in some other case may be abused and lead to the most serious ill consequences. Courts of trial can not too strictly observe the line of demarcation between their province and that of the jury in criminal cases arising under our law. We think that as was said in the State vs. Shields, 11 A. 395, the course pursued by the

court *a qua* in this case was "not only calculated to secure the unqualified verdict elicited by the question of the judge, but that it might well have been construed by the jury into an intimation of the court as to the guilt or innocence of the prisoner," and that "the discretion of the jury should not have been so trammelled." See, also, the case of the State vs. John Johnson, recently decided. 30 An. 921. The grounds for the motion in arrest of judgment have already been considered, and are insufficient.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be and they are avoided and set aside, and the case remanded to be further proceeded with according to law and the principles of this opinion.

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No. 6872.

THE STATE EX REL. MARTIN LANNES ET AL. VS. THE ATTORNEY GENERAL OF THE STATE.

Section 2593 *et seq.* of the Revised Statutes of 1870 does not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested.

It is discretionary with the Attorney General of the State to proceed, on his own motion, to bring suit for the forfeiture of the charter of a corporation, and hence he can not be compelled by mandamus to institute such a suit.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*E. K. Washington* for relator and appellee.

*H. N. Ogden*, Attorney General, for defendant.

The opinion of the court was delivered by

MARR, J. Martin Lannes and other private citizens, butchers, desired to bring suit against the "Crescent City Live Stock Landing and Slaughter House Company," a corporation created by act No. 118 of 1869, for a forfeiture of charter, and for ten thousand dollars damages, for failure to comply with the terms and conditions of the charter.

Recognizing the fact that a proceeding for forfeiture of charter must be in the name of the State, the plaintiffs applied to the Attorney General to make the State a party, and to sign the petition in the name and behalf of the State. The Attorney General declined to do this; and plaintiffs applied for a mandamus to compel him to perform his alleged duty in this respect.

The Attorney General answered that the act No. 156, of 1868, relied on by relators, was not applicable to their case; and that the appearance of the Attorney General in the cases contemplated by that act is merely formal.

The District Court was of opinion that the case made by plaintiffs was one coming within the act in question: and the Attorney General is appellant from the judgment making the mandamus peremptory.

Act No. 156, of 1868, is entitled "An act to amend and re-enact an act entitled 'An act providing a remedy against usurpations, intrusions into, or the unlawful holding or exercising a public office or franchise in this State,' approved September 8, 1868."

The act thus amended and re-enacted is No. 58, of 1868; but it is not necessary to refer to it more specially, because the amendatory act superseded it; and was incorporated and re-enacted in the Revised Statutes of 1870. Sec. 2593 *et seq.* This is the law by which the issues involved in this appeal must be determined.

The first section of this act authorizes suit to be brought by the district attorney, or district attorney *pro tempore*, in the country parishes, and by the Attorney General in the city of New Orleans, "or other person interested," in the name of the State, upon his own information, "or upon the information of any private party," against the party or parties offending in the following cases:

"FIRST. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office or franchise within this State; or

"SECOND. When any public officer shall have done, or suffered to be done, an act which by the provisions of law shall work a forfeiture of his office; or

"THIRD. When any association or number of persons shall act within this State as a corporation without being duly incorporated."

The second section makes it the duty of the district attorneys, and the Attorney General in the cases mentioned in the first section, to bring suit against the offending parties, "when so required to do."

The fourth section provides that when such suit is brought, "on the relation or information of any person interested," the name of such person shall be joined with the State as plaintiff.

Section ten declares that "when defendant, whether a person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant, and such damages as are proven to have been sustained."

These sections are the only parts of the act in question which have any bearing upon this controversy; and we shall consider them *seriatim*.

1. Every act of the Legislature must conform to the constitution of the State, under pain of nullity.

The constitution, article 114, declares that "every law shall express

its object or objects in its title ;” and if it had been the design of the Legislature, by this act, to provide for the forfeiture of the charters of corporations, at the instance of private persons, “parties interested,” the law would be amenable to the grave objection that no such object or purpose is expressed in the title.

The introductory part of the first section of the act provides how such suits as it authorizes may be brought, and against whom ; and it differs from the original act No. 58, in that this latter act authorizes the Attorney General alone to bring such suit, in the proper district court, “in the name of the people of this State, upon his own information, or upon the complaint of any private party.”

This language betrays the paternity of the act; and the act No. 156 was passed to adapt the imported law to our mode of procedure, and to the courts in which the litigation might be had. The suit must be in the name of the State, by the Attorney General in the parish of Orleans, by the district attorney or district attorney *pro tempore* in other parishes, upon his own information or upon the information of any private party.

The *first* alinea seems, by its terms, to relate, exclusively, to acts which may be done by a single individual. It contemplates the violation of a right which by law has been conferred upon and belongs to some other person, a public office or franchise, which the person offending has usurped or intruded into, or holds or exercises unlawfully, not because the office or franchise may not be lawfully held or exercised, but because the offending party is not the person who is by law entitled to hold or exercise it.

The *second* alinea relates, exclusively, to public officers, legally elected or appointed, and installed, who, while lawfully entitled to hold the office, have done, or suffered to be done, some act which by law works a forfeiture, not the destruction of the office, but of the right of the offending officer to hold and exercise the functions of that office.

The *third* alinea does not deal with single individuals, as the first and second manifestly do. It relates exclusively to aggregations of individuals, associations, or a number of persons, who have assumed to act as a corporation without having been duly incorporated.

The *first* alinea deals with an individual, any person, who violates the rights of some other person by unlawfully holding or exercising an office or franchise which such other person is by law entitled to hold or exercise; and the second alinea deals with the individual public officer, holding by a legal tenure, who has incurred the penalty of forfeiture by some act done by himself, or which he has suffered to be done. The third alinea alone has any reference whatever to corporations; and it is limited to such associations as assume to be corporations, without hav-



ing been duly incorporated. Corporations established by law are not even remotely, or by implication, included in this first section.

All the succeeding sections of this act refer to and are limited to the suits which the first section authorizes to be brought. The meaning of sections two and four seems plain enough. When the district attorney, or district attorney *pro tempore* in the country parishes, or the Attorney General in the parish of Orleans, knows, or when he has been informed by any private party, of the existence of any one of the causes of action mentioned in the first section, the usurpation, or intrusion into, or the unlawful holding or exercising of a public office or franchise, or that some public officer has done or suffered to be done some act that works a forfeiture of his right, or that an association of individuals or a number of persons pretend to be a corporation, without having been duly incorporated, the law requires him to proceed, and to bring suit against the offending parties. If the offense is such that it interests an individual, and the suit is brought on his relation or information, it must still be brought in the name of the State, but his name must be joined with the State as plaintiff.

By section ten, when a person or a corporation is defendant in such suit, that is, such suit as may be brought under section one, the judgment shall be exclusion from such office, franchise, or privilege, costs, and such damages as are proven to have been sustained. Not one word about the forfeiture of the charter granted to a corporation. The word corporation in this section would seem to be used in reference to the associations of individuals, pretending to be corporations, without having been duly incorporated, mentioned in the third alinea of section one.

If a person intrudes into, or usurps, or holds, or exercises a public office or franchise which some other person is entitled to hold or exercise, the State is offended, and is interested in ousting the wrongdoer; and the person unlawfully excluded is also interested in obtaining possession and enjoyment of the office or franchise. He may require suit to be brought; and the Attorney General or district attorney is bound to bring the suit, on the information or relation of the injured individual, who must be joined as plaintiff in the suit brought in the name of the State.

If the suit be to remove a public officer, who has done or suffered to be done an act which works a forfeiture, every citizen is interested; and the proceeding may well be on the relation of any citizen or number of citizens, joined with the State as plaintiffs. And so, if any number of persons associate themselves, and pretend to be a corporation, without having been duly incorporated, a citizen, or a number of citizens, might well be joined with the State as plaintiffs; and in all such cases the law officer of the State seems to have no discretion, and he

may be compelled by mandamus to perform the duty plainly prescribed by law.

The cases relied upon by the relators in this case, 21 An. 655; 21 An. 710; 22 An. 547; 23 An. 787; 24 An. 149, were contests for office; and the court held, and it is not to be questioned, that in such cases the suit must be in the name of the State; and that the law officer of the State may be compelled by mandamus to allow the use of the name of the State in the suit to oust the intruder or usurper, and to put into office the person complaining and claiming to be legally entitled.

The case in 22 An., State ex rel. Attorney General vs. Fagan and Others, was a proceeding under the third alinea of the first section of this act, against a number of persons associated under the name of the Live Stock Dealers' and Butchers' Association of New Orleans, styled a pretended corporation, organized for the purpose of doing and performing the acts which, by the act 118 of 1869, the Crescent City Live Stock Landing and Slaughterhouse Company was alone by law authorized to do. In such a case there is no doubt it would be the duty of the Attorney General, in behalf of the State, to protect the corporation lawfully chartered, and solely vested with the rights granted to it by the State, by the act of incorporation, against the attempt of another body or organization to exercise the same rights.

In the *Atchafalaya Bank vs. Dousin*, 13 Louisiana, 497, the doctrine is plainly laid down, that the government "creating a corporation can alone institute a proceeding for a forfeiture of charter, since it may waive a broken condition of a contract made with it, as well as an individual."

Charters of incorporation are treated as contracts; and if one of the terms of the charter be violated, the other contracting party, the State, may demand the forfeiture by suit, just as in a contract between two individuals. But article 2017 of R. C. C. declares that when the resolutive condition is an event not depending on the will of either party, the contract is dissolved of right; but where the condition is something to be done or performed by one of the parties, the dissolution must be sued for.

In the case of the *Atchafalaya Bank*, 13 Louisiana, Judge Martin stated that in 1813, when he was Attorney General, the banks suspended specie payments, and thereby incurred the penalty of forfeiture; that it devolved upon him to determine whether to waive or to proceed by suit for the forfeiture; that he chose not to sue; and the Legislature soon after placed him on the bench of the Supreme Court; and that his successor, Mazureau, who was Attorney General when the banks suspended the second time, had, in the exercise of his discretion, chosen not to sue.

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State ex rel. Lannes vs. Attorney General.

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The authorities cited in 13 La. 497, and in Abbott on Corporations, 339, show that it is discretionary with the sovereign power by which an act of incorporation has been granted to waive the forfeiture which has been incurred; and the waiver may be as well by inaction, the failure to demand it by suit, as by positive act.

In 1877 the Legislature amended the charter of this corporation; and this was necessarily a legislative recognition of the then legal existence of the corporation, and of the intention of the State not to demand the forfeiture. See act No. 144 of 1877, p. 220.

The Attorney General might, if he deemed it proper in the public interest, demand by suit, the forfeiture of the charter of a corporation; but he might be restrained by the action of the Legislature, as he might be instructed by the Legislature to proceed. In the silence of the Legislature the discretion is vested in him; and discretionary power can not be controlled by mandamus. It is only where the duty is imposed by law absolutely that its performance can be enforced by mandamus; and no individual or individuals can interfere with the State in the exercise of its sovereign power, nor compel the State to proceed for the forfeiture of a charter, which the State, in the exercise of its sovereignty, may not choose to demand.

The judgment appealed from is therefore annulled, avoided, and reversed; and the application of relators for mandamus is dismissed at their costs in both courts.

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No. 6738.

W. P. O'HERN vs. HIBERNIA INSURANCE COMPANY.

30	956
48	483
30	959
114	823

The deed from a tax collector, of property sold at a tax sale, is received *prima facie*, as a valid title. Until the tax sale is set aside by a revocatory, or other proper action, contradictorily with the parties in interest, the title from the tax collector is presumed to be valid.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Horace E. Upton* for plaintiff and appellant.

*Thos. Gilmore & Sons* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The Hibernia Insurance Company obtained an order of seizure and sale of an improved lot in this city, in foreclosure of its mortgage, and had caused advertisement of its sale to be made, when the plaintiff enjoined the sale by the proceedings in this suit.

The defendant moved to dissolve the injunction "upon the ground that it had issued improvidently and illegally, the allegations of the petition and the exhibits thereunto annexed being insufficient to authorize the issuance of the writ."

It is nowhere stated wherein is the insufficiency, or in what particular the allegations are deficient. Upon hearing, the motion or rule to dissolve was made absolute, and again the record fails to acquaint us with the reasons therefor. We do not wish to be understood as intimating that it is necessary or desirable in all cases that the judge of a lower court should assign the reasons of his judgment at length. We only note the absence of them here, because we are unable to perceive why the allegations of the petition were supposed not to be sufficient on their face to authorize an injunction.

These allegations are;—that the plaintiff is the owner of the lot advertised for sale, under a title translativ of property, (derived from a tax sale superior to the defendant's mortgage), and that the defendant is attempting to sell it. This sale is to satisfy a mortgage of a previous owner.

True, the plaintiff's title may not prove good upon examination. He alleges that he bought at a tax sale, and received a deed from the tax collector, and after six months interval, that he obtained a confirmatory deed from George B. Johnson, Auditor of Public Accounts, on February 24, 1877. We know that this last deed, confirming the previous title, is wholly invalid, because Johnson was not the Auditor at that time, but the deed from the tax collector is received by the courts as a *prima facie* valid title, Constitution, art. 118. Acts 1871, p. 120. Until that sale is set aside by a revocatory or other proper action, contradictorily with the parties in interest, the title from the State's officer is presumed to be valid until the contrary is shown. *Lannes v. Work. Bank*, 29 Annual, 112.

But it is not necessary to resort to those principles in order to dispose of this motion. The objection to the petition is that the allegations are on their face insufficient to warrant an injunction. Now if it be true that the plaintiff bought at the tax sale and therefore under the first and highest privilege, and that all the requisite formalities had been observed prior to it, and at it, and no redemption has been made or offered, it may very well be that his title will prevail to the detriment of the mortgage creditor of the previous owner. But if it should be discovered that these formalities have not been complied with, or that the plaintiff and purchaser at the tax sale is merely the mortgage debtor in disguise, who is helping him to evade the operation of the mortgage, and the payment of the debt, the reverse result would most certainly be produced.

These matters were not inquired into, and could not be, in the trial of a rule to dissolve on the face of the papers. The allegations of the petition are taken as true on that trial, and if true, do warrant an injunction. Therefore,

It is ordered and decreed that the judgment of the lower court is reversed, and the cause is remanded to be proceeded with according to law, the appellee paying costs of appeal.

No. 7048.

THOMAS LACHAMBRE & CO. VS. HENRIETTA AND J. L. COLE.

A suit to revive the judgment in a probate case, rendered by a district court before the creation of parish courts by the constitution of 1868, must be brought in the district court that rendered the judgment. Probate suits in which judgments had been rendered, were not transferred from the district to the parish courts.

**A** PPEAL from the Fifth Judicial District Court, parish of Iberville.  
*McVea, J.*

*Hewes & Parlange* for plaintiffs and appellees.

*Barrow & Pope* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. The object of this suit is the revival of a judgment under the act of 1853.

One Cropper obtained a judgment against the defendants in the fifth judicial district court for Iberville on May 10, 1867. The plaintiffs, claiming to be the owners of this judgment, which is not disputed by Cropper, instituted this suit in the fifth judicial district court for Iberville for the revival of the former judgment, and had citation issued thereon, which was served April 18, 1877. The service was therefore within ten years from the rendition of the judgment.

It is contended by the defendants that citation has issued from the wrong court, and an exception was filed by them to the jurisdiction of the district court, which can not be understood without an explanation of the original suit.

Cropper is the son of the defendant Mrs. Cole by her first husband. She was his tutrix, her second and present husband was co-tutor, and the suit was for an account, and for judgment for such sum as should be found to be due, and it was had for over fourteen thousand dollars. This was under the Constitution of 1852, whereby district courts had jurisdiction of all matters affecting successions, and minors.

The constitution of 1868 followed, creating parish courts with jurisdiction of those subjects, and the defendants contend that the suit for

revival should have been instituted in the parish court of Iberville, because that court alone had now jurisdiction of such matters as are embraced in the original suit, and further because by the act organizing the parish courts, the clerks of the district courts are required to transfer to the parish courts "all causes now pending and on file" which fall under the jurisdiction of the latter. Acts 1868, p. 63.

It would be a strained construction to hold that the clerks, under this mandate, must transfer to the parish courts all causes, complete and ended, as well as those pending. A great mass of records is in the clerk's office of causes which are ended. If that officer be required to transfer to the parish courts all of these that should have been brought in a parish court, had one existed from 1852 to 1868, who is to say what records he shall thus transfer? Experience has taught us that it was not an easy matter for courts to determine correctly where was the dividing line between the two jurisdictions, and the clerks would surely have been unable to do it. The phraseology of the act does not leave this question doubtful. All causes now pending and on file which fall under the jurisdiction of the parish courts must be transferred to them, and the parish court shall try and determine the same, and make all orders therein that may be legal and proper. It is not all causes which would have fallen under the jurisdiction of the parish court, but those which fall under that jurisdiction according to the constitution and that Act, which must be transferred. And for what purpose? That the parish court may try and determine the same, and make orders therein. And to make the meaning of the act certain, it is added—the clerk of the district court shall issue all executions and writs, or orders of any kind, in all cases previously decided in those courts for any purpose whatever. *Idem*, p. 62.

The suit, or contestation, which was terminated by the judgment of May 1867, properly remained among the records of the district courts, because it was not pending. But it may be that some would consider the expression 'pending and on file,' to mean two classes of causes, viz those pending which are undecided, and those on file which means every cause among the records which falls within the description of the Act. There is no comma after 'pending.' The two expressions refer to the same class of causes, as the other expressions in the same clause plainly indicate. How is the district court to issue executions or orders upon judgments already rendered, if the suits or records containing the judgments are transferred to another court?

It would not matter however if the clerk of the Iberville court had transferred this record to the parish court. The court which has jurisdiction of suits for revival of judgments is distinctly pointed out in the act of 1853 which provided for their revival. The citation must issue

from, and the suit must necessarily be addressed to the 'court which rendered the judgment.' Rev. Stats. sec. 2813.

The district court for Iberville rendered the judgment, and in that court was properly instituted the proceeding for its revival.

It is not necessary to examine the bills of exception, which have no reference to the points on which we have rested our decision. There was testimony shewing the inscription and reinscription of the judgment of 1867, offered doubtless to shew the continued vitality of the judicial mortgage, but it is wholly out of place in such suit as this, the sole object of which is to keep alive the original judgment by a revival. The suit of revivor having been instituted before the proper court, and the citation having been served within ten years from the date of the original judgment, it was held below that the plaintiff was entitled to its revival.

Judgment affirmed.

#### ON REHEARING.

Upon reconsideration of our former opinion, we see no reason to make any change, and therefore

It is ordered that our former decree remain undisturbed.

No. 2925.

DAVID G. COOKE VS. HUGH AND ANDREW ALLISON.

Where a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Leaumont*, J.

*Thomas Gilmore & Sons* for plaintiff and appellant.

*E. N. Huntington* for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. On the 25th of July 1865, plaintiff and defendants formed a commercial partnership for the transaction of a cotton factorage and general commission business, which expired on the 1st of June 1868.

On the 15th of February 1866, Hugh Allison alone was at the office of the partnership, his brother Andrew was absent from the City and Cooke at home and sick.

One James R. Howard, wishing to obtain an advance of money went—on that day—to Cooke's house, and Cooke—by a written note—referred him to Hugh Allison.

What became of that note? One of the bookkeepers said that, some time after the transaction, he himself handed it to Hugh Allison, and at the latter's request. A subpoena *duces tecum* was issued commanding its production by Hugh Allison, who answered: "I have not the note referred to, do not know any thing about it."

David Cook testified that—to the best of his recollection—the purport of the note was that Howard wanted some money and to see what he could do for him: no amount was therein mentioned, nor was it an order to pay the money. This statement is corroborated by the bookkeeper, who read the note and testified further that he thought that, by the terms of said note, the matter was left at Allison's discretion.

Whether it was or not, Hugh Allison requested the bookkeeper to fill a check for \$12,500, signed and handed it to Howard, who acknowledged, in writing, that he had received that sum from the firm. The amount of the check was paid and debited to Howard.

Andrew Allison returned to the City, heard of the transaction, protested against it as having no connection with their legitimate business and insisted that it should be charged to Cooke's account. According to Andrew's declaration, Cooke—when informed of his determination—objected to it at first, and thereafter consented, remarking "that it was a good thing and that his partners would have none of the profits to arise therefrom." Cooke admits that he then made a remark of that kind, and told his partners that—if they were dissatisfied with the transaction, he would take it for his own account: that they did not assent to his proposition, and Hugh Allison replied that if there was any thing to be made by it, he was entitled to his share.

The bookkeeper was directed by the brothers Allison to transfer to Cooke's account the amount of the check, and it was done. Cooke swore that he had not authorized that transfer, and his declaration as to this fact is supported by those of the bookkeepers, who testified that he always objected to it, and—for that reason—would not allow the books of the firm to be balanced.

Hugh Allison's statement is that he paid the \$12,500 on an order from Cooke, believing that—on Cooke's return to the office, he would explain why this money was given to Howard: he failed to explain and—at his own request—the amount was charged against him. To the knowledge of Hugh, Cooke never objected to that charge. His declaration, on this point, is contradicted by, and contradicts that of plaintiff and of the bookkeepers. The note, or—as he calls it—the order which he took from the files of the office, might have sustained his assertion



## Cooke vs. Allison.

and neutralized that of his partner and employees, but—when ordered to produce it—his answer was “that he knew nothing about it.”

When the advance of \$12,500 was made to Howard, he was indebted to the firm for \$1256, and had then shipped to it only six bales of cotton. It seems strange that—under such circumstances—Hugh Allison, who was not bound to do it, concluded to first pay him so large an amount, and then await his partner's return to ascertain why it was that the money had been given to Howard.

On the trial, Cooke objected to that part of Hugh and Andrew's deposition and to the questions put to and answered by himself, tending to show that he had agreed to the transfer—from the firm's account to his own—of the charge of \$12,500, on the ground that it was an attempt to prove—by parol evidence—that he had assumed to pay the debt of Howard. His exception was properly overruled. The object of the evidence thus admitted was to prove, and did establish that it was two of the partners and not the partnership who made a loan to Howard, and that the transfer of the charge from one account to the other was but the correction of a previous and erroneous entry. That correction was incomplete: the amount of the check should have been charged to Cooke, who—it appears—advised the making of the loan and approved it after it was made, and to Hugh Allison who, on a mere suggestion of Cooke, paid the money to Howard.

Andrew Allison's statement is that said money was invested in Mexican Gulf Rail Road stock: that the intention to so invest was mentioned before he left the City, and that he opposed the transaction as having no connection with their legitimate business: that, when he returned to the City, and found that the loan had been made, he informed Cooke of his determination that said loan should be charged to his account: Cooke agreed to it and it was done.

Plaintiff denied that the money was advanced to Howard to invest in the stock of the Mexican Gulf Rail Road, and testified that the transaction was simply a loan on interest and commission. He, however, confessed that he had told the two brothers: “it is a good thing and if you are dissatisfied, I will take it myself,” and Hugh Allison alone replied, in substance, that if any profit came from it, he was entitled to his share.

It is difficult not to conclude that said loan was the transaction opposed by Andrew Allison and disapproved by the advisers of the firm, before Andrew's departure from the City, one which took place during his absence, and against which he protested from the day on which it was proposed, as not being connected with the legitimate business of the partnership. The lower court so believed, and its judgment is affirmed with costs.

No. 6913.

J. N. BROWN, ADMINISTRATOR, vs. E. A. R. BROWN.

The allegations in a petition that a certain transfer of property is a simulation, and that it is a donation in disguise, are inconsistent.

When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, the transaction is not a simulated one.

The delivery of immovables, where they are disposed of by public act, is always considered as accompanying the act, whether that act be a sale, or a *donation en paiement*.

Even when it is shown that the expressed consideration of a transfer does not exist, the contract can not on that account be invalidated, if the transferee proves that there was another legal, and sufficient consideration.

**A** PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Robertson*, Judge *ad hoc*.

*W. H. Jack*, *J. F. Pierson*, and *Edward D. White* for plaintiff and appellee.

*L. B. Watkins* and *Egan & Ogden* for defendant and appellant.

The opinion of the court on the merits was delivered by *SPENCER, J.*, and on the application for a rehearing by *MANNING, C. J.*

*SPENCER, J.* In August, 1876, the plaintiff, alleging himself administrator, and a forced heir of John W. and Mary H. Brown, deceased, filed this suit against his sister, the defendant, and prays that a certain tract of land on the west side of Red river in the parish of Red River, in defendant's possession, be decreed to belong to the successions of said decedents; that the act of transfer thereof made by John W. Brown to the defendant on February 13, 1868, be declared a simulation made in fraud of creditors, "and a *donation in disguise*, and null and void." Defendant, alleging that the plaintiff's demands were inconsistent, moved that he be required to elect between them. The district judge overruled the motion, on the ground that the action was, in substance, one *en declaration de simulation*. We think that it is inconsistent to allege that an act is a pure simulation and a donation in disguise. A simulated act is nothing. It is "*vox, et præterea nihil*," while a disguised donation is a reality, and may be and often is a good and valid contract.

But we think the subsequent proceedings in the case show that both parties limited the contest to the single issue of simulation *vel non*. The defendant put at issue "the question of simulation alone," and plaintiff confined his case to that issue, and the value of rents and revenues after the death of John W. Brown, in 1873.

This is a family quarrel, and, as might be expected, there is much contradictory swearing, the family being about equally divided between the contestants. Some of the witnesses, especially the plaintiff and his

brother, W. W. Brown, can hardly be said to have testified. They delivered set orations and elaborate arguments, instead of depositions. The protestations of defendant's counsel, and a record bristling with exceptions to the admissibility of this argumentation, seem to have been unavailing to stop this torrent of declamation. It would be an endless task to attempt a detailed notice of all these objections and exceptions, running through several hundred pages of closely written record. We have gone carefully through it all, and will state the facts as they impress us.

On the thirteenth February, 1868, John W. Brown by authentic act conveyed to his daughter, Elizabeth A. R. Brown, the land in question, for the price and sum, as declared in the act, of \$1617, cash in hands paid. The daughter lived in the house on the east side of Red river, with her father and mother, the latter being very infirm and paralyzed. The father after the sale continued to manage and control the place sold on the west side, rented it out to tenants, and collected the rents, and disposed of them about as he pleased. The leases were usually made by him in the name of his daughter, but until his death in 1873 she seems to have taken no active control, at least no ostensible control. It is shown that at the date of this transfer John W. Brown owed a debt to Chaffe & Brother of some \$2000, and another small debt of about \$150. There is no pretense that he was then insolvent. In fact, if plaintiff and his witnesses are credible, he was five-fold solvent. In October, 1870, Chaffe & Brother brought suit against Brown and Sherrod for \$1050, balance due them, and obtained judgment therefor in January, 1871, against the defendants *in solido*.

Plaintiff and his brother, W. W. Brown, and his sister, Mrs. Turner, and her husband swear that it was well understood in the family that this transfer was a simulation, and they repeat many conversations of their father to that effect; and J. N. Brown details one which he says took place in the presence of Elizabeth, the defendant. The defendant and her brother, T. C. Brown, and sister, Mrs. Giddens, swear to the verity and reality of the sale, and the defendant flatly denies the plaintiff's statement as to her ever being present when her father said the sale was simulated.

The evidence shows that the consideration of this transfer was not cash, as declared by the act, but consisted of three notes, two for \$400 each, with six or eight years interest thereon, and one for \$176. This last note is shown to have been held by plaintiff, J. N. Brown, against his father, who requested him to let him have it for Elizabeth, in order to make up a more ample price for the property. The two notes for \$400 each were predicated on a sum of \$600, which John W. Brown collected and received in 1860 and 1861, on account of salaries due Elizabeth as a public school teacher. Shortly before the transfer he delivered her

his said two notes for \$400 each, in settlement of this debt. There is no doubt or dispute about the fact that he received and collected this sum of \$600, as stated, and that she was at the time *sui juris*; but her brothers, J. N. and W. W. Brown, *argue* that when she graduated some years before her father bought her a fine piano, and that this \$600 must be considered as a payment for that. That she lived with her father, and was maintained by him like the other children, etc. *Per contra*, the defendant shows that her services in the household, and her constant attention to her infirm mother were worth far more than her support. Suffice it to say that her father seems to have taken the same view, and gave his notes for an undoubted debt due her. If he saw proper to offset her support by her services he had a right to do so, and from the evidence we think he acted justly in so doing.

There was then a real and valid consideration for this transfer, to the extent of this \$600 and interest, evidenced by these notes. The transaction was, therefore, *not a simulation*. It may have been intended to defraud creditors. We rather think it was. The plaintiff and his witnesses declare that his purpose was to put his property out of their reach; and J. N. Brown, plaintiff, and his brother, W. W. Brown, swear in effect that they *counseled and consented to his doing so*. It is not clear but that J. N. Brown and W. W. Brown, under these facts, were parties to this transaction, and are estopped from disputing its verity. "*Nemo allegans suam turpitudinem est audiendus.*"

The possession of the vendor after the sale creates, as to third persons, a presumption of simulation, unless the verity of the transaction be shown. C. C. 2480, 1921. That presumption has been rebutted in this case by showing that there was a consideration, perhaps inadequate, yet real and actual.

Plaintiff contends that this was not a sale, but a *dation en paiement*, and without effect for want of delivery. C. C. 2656.

The reason of this rule is not at first glance very apparent, but we take it to be that a payment is never complete until the thing to be paid is delivered. But the *delivery of immovables is always* considered as accompanying the *public acts* by which they are transferred. C. C. 2479.

We are aware that in the case of Shultz vs. Morgan, Chaffe & Bro., intervenors, reported in 27 An. 618, Justice Taliaferro, as the organ of the court, seems to deny the application of this rule to transfers of immovables by authentic act by way of *dation en paiement*. He says that "it is of the very essence of the *dation en paiement* that delivery should be *actually made*," and cites as authority 3 M. 226, 269; 12 L. 375; 3 A. 280, and 20 A. 282.

Article 2656 is as follows: "The giving in payment differs from the

ordinary contract of sale in this, that the latter is perfect by the mere consent of the parties, even before the delivery, while the giving in payment is made only by delivery." Justice Talliaferro interpolates the word "*actual*," which is not found in the text of the article. What constitutes delivery must be determined by reference to other provisions of the Code. The language of the court in 27 A. would be substantially correct when applied to immovables transferred by *private* act or to movables; but we have seen that "*the delivery of immovables is always considered as accompanying the public act transferring them, whether that act be a sale or dation en paiement*." By reference to the cases cited as authority by the court, to wit: 3 M. 226, 269; 12 L. 375, and 20 A. 282, it will be seen that they were all cases relating to movables. The case in 3 A. 280 is not in point. It may be added that it is not very apparent whether the acts in question in the case in 27 A. above referred to were *public* or *sous seign privée*. But so far as the *dictum* of that case is applicable to *public acts transferring immovables*, whether they be sales or *dations en paiement*, we can not give it our assent.

Under this rule of article 2479, and in view of the fact that the transferee was a female living with her father, who attended to the leasing of the lands transferred, which lay across Red river, we think it clear that John W. Brown could not, without being a trespasser, have disputed her possession, or denied the delivery. C. C. 2479. If he could not, it follows that the rule of article 2656 requiring delivery in *dations en paiement* had been complied with, since that rule applies as well between the parties as others. Moreover, the plaintiff's petition alleges without qualification that the "said Elizabeth A. R. Brown is in possession of, and claims to be the owner of said lands, by virtue of said act of sale, etc." Besides, the transfer is not attacked in the petition as a *dation en paiement* inoperative for want of delivery, but as a *simulated sale*.

The plaintiff's objection that defendant could not prove what was the real consideration of the transfer; that the act declared the consideration to be cash, and that it was not competent to show that it was notes of the vendor, is not well taken. C. C. 1900. "If the cause expressed in the contract should be one that does not exist, yet the contract can not be invalidated if the party can show the existence of a true and sufficient consideration."

When a contract, therefore, is *attacked* on the ground that the expressed consideration does not exist, or that there was no consideration for it, the party may show other consideration than that expressed in the contract. The court below improperly sustained said objection, and we have given effect to said evidence, which is in the record. Under the view we have taken it is unnecessary to notice the other bills of

exception in the record, as the matters to which they relate do not affect the grounds of our decision.

While, therefore, we hold that the transfer by John W. Brown to the defendant was not a simulation, it may have been intended as a fraud on his creditors, or it may have been to a large extent a gratuity to her, and prejudicial to the reserves of his forced heirs. The action of the creditors to annul is doubtless barred, but the forced heirs may have right to proceed against defendant for reduction and collation, in so far as the transfer may have been gratuitous.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now decreed that plaintiff's demands be rejected at his costs in both courts.

#### ON REHEARING.

MANNING, C. J. Upon a re-examination of the grounds of our opinion, we see no reason to change our decree.

It is therefore ordered that our former decree remain undisturbed.

#### No. 7074.

#### THE JEFFERSON AND LAKE PONTCHARTRAIN RAILWAY COMPANY VS. THE CITY OF NEW ORLEANS.

Under the present charter of the city of New Orleans, the city may obtain the dissolution of an injunction against it, without furnishing the bond and security required of other litigants by article 307 of the Code of Practice.

A defendant in injunction, on complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury to the plaintiff.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*Geo. L. Bright* for plaintiff and appellant.

*B. F. Jonas*, City Attorney, for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. The city was enjoined from using and maintaining on the land of the plaintiff, a canal running from North Line Street to Lake Pontchartrain, and from draining into said canal, and over the property of the plaintiff, and from entering upon the land of the plaintiff and from trespassing thereon, and from preventing the plaintiff's damming said canal so as to prevent the city's draining therein.

The district court permitted the city to bond the injunction, and dispensed the city from giving security.

From this order the plaintiff appealed.

The right to bond is claimed under article 307, C. P., and to bond without security, under sec. 33, City Charter. E. S. acts 1870, page 44.

Art. C. P. 307 provides: Whenever the act prohibited by the injunction is not such as may work an *irreparable* injury to the plaintiff, the court may in their discretion dissolve the same: provided the defendant execute his obligation in favor of the plaintiff, with the surety of one good and solvent person residing within the jurisdiction of the court, for such sum as the court may determine, according to the nature of the case, as security that he will deliver the property in dispute in the same state in which it was at the moment of issuing the injunction, and that he will pay besides to the plaintiff all damages he may have sustained by this act, if a definitive judgment be rendered against him in the suit pending.

Two questions are presented for determination: First—Is this a case in which the City can be dispensed from furnishing the bond required by art 307 of the C. P.? Second—Is the act prohibited by the injunction such as may work an irreparable injury?

#### I.

Plaintiff's action is a judicial proceeding, in which one of the litigants is the City of New Orleans, and the City's Charter provides: that it shall be dispensed from furnishing bond or security in all judicial proceedings where—by law—bond and security are required from litigants—The Judge of the lower court properly held that—under the provisions of its charter, the City could obtain a dissolution of the injunction issued against it, without furnishing bond and security. For the damages which may result from that dissolution, every one of the inhabitants who reside within the limits of this vast corporation is answerable, and when and where all are bound, it would have been mere surplusage to add a separate and individual obligation, to a collective and corporate responsibility.

#### II.

Is the act prohibited by the injunction one which may cause an irreparable injury to plaintiff? What is the act complained of? Does it involve a change of any one of the parties' possession, or a change of their respective positions, as they existed at the date of, and immediately preceding the issuance of the injunction?

Plaintiff alleges that in August 1871—more than six years ago—the commissioners of the second drainage district forcibly, wrongfully and illegally entered upon its land, and—then and there—began to dig a canal, afterwards completed by the city—which extends from North line Street, and through the entire length of said land, to lake Pontchartrain, a distance of 16,459 feet. That, by means of that canal, the waters and

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Jefferson and Lake Pontchartrain Railway Co. vs. City of New Orleans.

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filth of the City have been carried over the property of plaintiff, which—for this and the other causes it alleges—claims from the City the sum of one hundred thousand dollars, and asks that it be perpetually enjoined from draining into said canal.

Had the court refused to dissolve the injunction, it is manifest that, during the approaching summer and fall, a considerable portion of the City would have suffered from an inevitable accumulation of rain water, the stagnancy of which might have caused material injury and endangered the public health—whilst, so far as plaintiff is concerned, the injury it apprehends is not of an irreparable character, and can hardly be compared to that which might result from the unexpected suspension of a legitimate or usurped privilege, the exercise of which plaintiff appears to have silently tolerated from 1871 to 1877. Its prolonged tolerance may not amount to a renunciation of its alleged rights, but it justifies the action of the lower Court. The dissolution of the injunction did not—in the least—reduce the extent of plaintiff's possession, as enjoyed by it at and before the date of the injunction. That dissolution merely reinstated the parties in the position which they had previously occupied; and provisionally continued a state of things abruptly repressed and which—before the repression—had openly existed for upwards of six years. In this there is no error.

The judgment appealed from is—therefore—affirmed with costs.

Mr. Justice EGAN took no part in the decision of this case.

No. 6805.

F. A. LULING vs. LABRANCHE, TAX COLLECTOR.

A planter or manufacturer who keeps such articles of merchandise only as are needed by laborers on his plantation, and sells them only to those laborers, and not to the general public, is not a retail dealer within the meaning of the revenue act, and hence is not subject to the license, or tax imposed on retail dealers.

**A** PPEAL from the Parish Court of St. Charles. *Harper, J.*

*James D. Augustin* for plaintiff and appellant.

*H. N. Ogden*, Attorney General, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff was required to pay the State and parish licenses for keeping a retail store, wherein goods, wares, and merchandise were sold. The process sued out here is an injunction restraining the tax collector from enforcing the payment of the sums



demanded for licenses, and is grounded on the alleged fact that the plaintiff is not a retail dealer or storekeeper, in the proper and statutory sense, but keeps such articles of merchandise only as are needed by the labourers on his sugar plantation, and sells them to those labourers alone, and not to the general public.

The proof is, that the plaintiff is not a merchant or 'storekeeper,' as these words are used in common parlance, but a planter, and manufacturer, on a large scale, employing over a hundred laborers—that he does not traffic as a merchant, and does not sell to, nor invite the public to buy from him—that he did make the experiment in 1876 of keeping an open and licensed store, but found it prejudicial to his employees, and destructive of order and discipline, and consequently abandoned it—that he has since supplied himself with the wares the labourers usually need, and these are delivered to them when needed, and the cost price with some small per centage added, is charged to the labourer and deducted from his wages, and that no one but the employees on the place are permitted to buy, or do buy.

On the other hand it may be urged, that selling to any one by retail brings the party thus selling within the meaning of the term, retail dealer, and that at two sessions of the General Assembly there has been a legislative interpretation of the meaning of that designation—first in 1866, when that body deemed necessary a special exemption of planters from paying the license of a retail merchant when they sold exclusively to their employees, (Acts 1866, p. 236) and again in 1868 when that exemption was repealed. Acts 1868, p. 119.

No doubt the first act was intended as a legislative declaration that planters, who sold to none but their employees, were not legitimately included within the designation, 'retail dealers', and the second act was intended to deprive the planters, who thus sold, of the benefit of that declaration. But the question is a judicial one now, that the designation of a class appears in the revenue act, without any explanatory or qualifying interpretation elsewhere.

The ordinance of the police jury uses the words 'each and every trade store, wherein goods, etc. are sold at wholesale and retail', and the tax collector exacts the license as due from a storekeeper selling general merchandise.

A person whose business or avocation is that of planter or manufacturer, and who keeps in store only such goods and wares as his employees require, and who sells to them alone and not to the general public and who sells, not as a retail dealer does, exclusively for the profit, but only as an advance to his labourers and an incident to his main business, and to promote its better administration, is not a retail dealer within the meaning of the revenue act, and the tax or license

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Luling vs. Labranche.

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imposed upon that class of persons by that act is not legally demandable from him.

It is in proof in this case that the plaintiff pays taxes upon an assessment of valuable property, including the sum employed as capital in trade, and under the proof before us in this record, he is not liable to the tax, the payment of which was refused.

The judgment is erroneous, and it is ordered and decreed that it is reversed, and the injunction is perpetuated at defendant's costs.

No. 7080.

JULES MAYRONNE, TUTOR, ET AL. VS. EUGENE WAGGAMAN ET AL.

Before an immovable, of which the widow in community and her minor children are the owners in indivision, can be legally sold, or mortgaged, it is necessary that a family meeting, legally constituted, shall set forth in its report that the sale, or mortgage, is of absolute necessity, or of evident advantage to the minors, and give its reasons for its determination.

A family meeting, partly composed of one or more persons who have interests in conflict with those of the minors, is not legally constituted.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*Bentlick Egan* for plaintiff and appellant.

*Alfred Grima* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. Eugene Hacker died in April, 1871, intestate, leaving a widow, Mrs. Agathe Leromain Hacker, and eight children, one of them wife of Numa P. Hacker, and seven minors. The widow was confirmed as natural tutrix of the minors, and Numa P. Hacker, their brother-in-law, was appointed under tutor. In April, 1872, about a year after the death of her husband, Widow Hacker, on her petition and prayer to that effect, was judicially recognized as widow in community, entitled in full ownership to one half and as usufructuary to the other half of the property inventoried in the succession, and was put into possession of the whole. The succession of Hacker was thus closed.

In June, 1872, Widow Hacker presented a petition in which she stated that the property of the succession consisted of real estate, with the buildings and improvements, some shares of stock in the People's Bank, and a hardware store, the business of which she had continued. "That in order to provide for the means to carry on her business properly for her wants and those of the minors, and for the purpose of paying the debts of the succession, it is necessary that she should

mortgage the real estate to the amount of six thousand dollars, and sell said shares, but she can not do this without the advice of a family meeting."

The family meeting was convened, and without assigning any reason for it, declared unanimously that it was "to the interest of said minors that the shares in the People's Bank be sold and that the immovable property \* \* \* be mortgaged for the amount of ten thousand dollars."

It does not appear whether the members of this meeting were relations or merely friends of the minors, except that Hamilton N. Gautier, one of them, had married one of the minors, and Numa P. Hacker, the husband of another one of the daughters, in his capacity as under tutor approved the deliberations. The proceedings were homologated and the widow was authorized to sell the shares of stock and to mortgage the real estate; but, like the deliberations of the family meeting, this order is silent as to the terms or conditions of the sale and of the mortgage.

The widow, in her own right and as natural tutrix of her six minor children, Mrs. Eugenie Hacker, assisted by her husband, Numa P. Hacker, and Mrs. Léocadie Hacker, assisted by her husband, Hamilton N. Gautier, executed a promissory note at one year for \$5000, and granted a mortgage in favor of Aimé Gautier to secure the payment, binding themselves jointly and *in solido*.

Referring to 28 A. 446, it will be seen that in January, 1873, Joseph Duvineaud was appointed administrator of the succession of Hacker: that in July he filed a statement of debts, and obtained an order to sell the real property at one third cash, balance in one and two years: that Gautier intervened and obtained a modification of the order so as to require the sale to be for cash; and that, on appeal, this court held and decided in April, 1876, that the succession of Hacker was closed by the putting of the widow into possession as owner of one half and usufructuary of the other half: that the succession was no longer under the jurisdiction of the Second District Court; and that the entire proceeding was void.

In May, 1876, soon after this decision, Aimé Gautier, the mortgagee, obtained executory process on the note and mortgage. The execution of the writ was delayed by the opposition of Widow Hacker, then by her death, by the death of her daughter, Mrs. Numa P. Hacker, by the alleged refusal of Numa P. Hacker to qualify as natural tutor of his two children, minors, and by the marriage of one of the daughters, Malvina Hacker, to Jules Mayronne.

Mayronne qualified as tutor of the minors; and in his capacity and to authorize and assist his wife, he obtained an injunction, alleging sub-

stantially that the mother had no authority to borrow money and to bind them by note and mortgage, and that they received and she received no consideration for the same. They also prayed for damages for the wrongful seizure of the property.

Gautier answered by general denial, and prayed for the dissolution of the injunction with damages. The judgment appealed from dissolved the injunction with \$500 damages, and two per cent additional interest, which latter was remitted.

The whole proceeding in this case is extraordinary. The appraised value of the succession of Hacker was \$65,526. When the mortgage was granted by the widow, in July, 1872, the certificate of mortgages showed that there were no incumbrances on the property, except for the drainage tax; the vendor's mortgage to secure \$2800 represented by two notes, which were exhibited to the notary and parties present, paid, cancelled and defaced; the recording of two bonds in 1868, the other in 1869, given by Hacker as treasurer of a fire company, and the general mortgage against Mrs. Hacker as tutrix.

The statement in Mrs. Hacker's petition, that she had continued the hardware business and that at the end of the first year it was necessary to sell the bank stock and to mortgage the real estate of the succession to provide means to carry on her business, ought to have alarmed the family meeting. Instead of refusing to consent to the extraordinary demand of the widow, this meeting was unanimously of opinion that she ought to be allowed, not only to sell the bank stock, but to mortgage all the real property for four thousand dollars more than she had had the courage to ask for in her petition. It is strange that the judge did not unqualifiedly refuse to approve and homologate these proceedings, which seem to have been conducted in utter disregard of the rights and interests of the minors.

When it becomes necessary to call a family meeting, it must be composed of relations of the minor, if there be a sufficient number in the parish, or in an adjoining parish, within thirty miles. In her petition Mrs. Hacker gave the names of seven persons without reference to their relations to the minors, nor are they in the judge's order appointing them, nor in any part of the proceedings, as far as we have discovered, styled "friends." It appeared on the trial of this case that one of them was a clerk in the hardware store in which Mrs. Hacker and Gautier were partners. The mortgage shows that Gautier, one of the members, was the brother-in-law of the minors, but, as we shall presently see, he was incompetent by reason of his interest conflicting with that of the minors: R. C. C. 283; and Numa P. Hacker, the under tutor who assisted and who approved the deliberations of the meeting, occupied a position equally disqualifying.

Put into possession as absolute owner of one half and as usufructuary of the other half of property inventoried at more than sixty-five thousand dollars, Mrs. Hacker found it necessary, within about a year after the death of her husband, to ask for a loan of six thousand dollars, on mortgage, and for an order to sell the most available of the personal property, the bank stock, to enable her to carry on properly her hardware business which she had continued without interruption from the death of her husband. Of course, it did not long survive under such management, and was bankrupt within a few months after this temporary relief.

The law declares that the immovables of the minor can not be alienated nor mortgaged, unless, on the representation of the tutor that it is for the interest of the minor, a family meeting shall declare that the sale or mortgage is of absolute necessity, or of evident advantage to the minor. R. C. C. 339. How could any one imagine that it was either absolutely necessary or of evident advantage to these minors that their property should be incumbered to provide their tutrix with means to carry on her mercantile business, which was hastening, under her management, to its ruin?

In case the family meeting shall consider the sale or mortgage to be advantageous to the minor, "it shall set forth the reasons of its determination in order that the judge may decide whether he ought to cause it to be homologated, and shall fix the terms of credit on which the property shall be sold, and the other conditions of the sale, if the case requires it." R. C. C. 340.

There is not one word in the deliberations of this meeting approximating a reason for its determination, nor as to when or how the stock shall be sold, whether for cash or on credit, whether by public or private sale, whether with or without notice by publication or otherwise; nor is there any thing said about the stipulations in the mortgage, nor the rate of interest to be paid, nor on what credit the mortgage debt is to be contracted.

Several witnesses were examined on the trial, among them Hamilton N. Gautier, and the book-keeper and other employees of the hardware concern. These witnesses say that the debts of the succession were \$20,000; but not one of them could give the name of a single creditor. The style of the business was Hacker & Co., and Numa P. Hacker was a partner with Mrs. Hacker at one time; but it does not appear when he became or when he ceased to be a partner. Hamilton N. Gautier was a partner at the time the mortgage was granted; but whether he and Numa P. Hacker were partners at the same time it does not appear.

Aimé Gautier, in whose favor the mortgage was made, was the

father of Hamilton N. Gautier. It is not pretended that he lent Mrs. Hacker \$5000. The testimony, very unsatisfactory in this respect, tends to show that he discounted the \$5000 note at eight per cent, and that, at different times, he handed to his son the proceeds, \$4600, part of it before the execution of the mortgage. Hamilton N. Gautier says the debts of the store, contracted after the death of Hacker, amounted to some thirty to forty thousand dollars. Whatever money Aimé Gautier advanced, the whole of it was deposited in bank to the credit of the account of Hacker & Co., and it was checked out like any other money belonging to that account. Nothing shows that Mrs. Hacker ever touched or had personally the benefit of a single dollar of this pretended loan, except, as Gautier says, it was carried to her credit on the books of the concern, and though the witnesses were pressed, one and all, they could not give the name of a single creditor of the succession of Eugene Hacker, nor the amount of a single debt of that succession, to which any part of the money was applied. It fully appears that Hamilton N. Gautier was actively managing the business at the time of this pretended loan, as one of the partners; and it is most extraordinary that he could not give the name of any creditor nor the amount of any debt of the succession paid out of this loan.

In July, 1873, when Duvigneaud, in his capacity as administrator, presented a statement which he said contained all the debts which he had been able to ascertain at the end of six months after his appointment, the whole consisted of a judgment in favor of the attorney who represented Mrs. Hacker in the early stages of the proceeding up to her confirmation as natural tutrix, say for \$876 50, about \$120 due to three insurance companies, the taxes for 1871 and 1872, and the costs and expenses of the administration. If the succession was so largely indebted, how can the silence of the creditors for more than two years after the death of Hacker be accounted for? This record does not disclose even the name of a creditor, except as stated by Duvigneaud; and we have seen that Hacker left his property virtually unincumbered.

The whole case indicates the utter want of consideration for the note and mortgage, so far as the heirs of Eugene Hacker are concerned. As to the minors, the note and mortgage are absolutely void. As to the two major heirs who joined their mother in these contracts, the testimony makes it more than probable that they were deceived and were in error; that the pretended loan was exclusively for the benefit of the partnership of which their husbands were members, debts of the respective communities for which they could not lawfully make themselves liable; but we will not conclude the mortgagee with respect to these major heirs, because he may have rights against them which can be established under proper issues by additional proof.

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Mayronne vs. Waggaman.

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Mrs. Numa P. Hacker left two children, minors. Their father, natural tutor, did not appear to represent them, and a tutor *ad hoc* was named by the court to represent them in the executory proceeding.

It seems more than probable, from the mismanagement of the hardware business, that the minors, for whom their mother was tutrix, will have mortgage rights against her succession which will exceed in amount the entire value of her interest in the remnant of the succession, the real estate, and that they would be preferred to the mortgagee, Gautier. Enough appears to warrant the perpetuation of the injunction, and to compel Gautier to proceed *via ordinaria* to establish his rights, whatever they may be, against the succession of Mrs. Agathe Leromain Hacker, against the succession of Eugenie Hacker, late wife of Numa P. Hacker, and against Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, on the note and mortgage in question.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the note at twelve months for \$5000, dated 29th July, 1872, and the mortgage executed by Mrs. Agathe Leromain Hacker, in her own right, and as natural tutrix of her minor children, and by Mrs. Eugenie Hacker, wife of Numa P. Hacker, authorized and assisted by her husband, and by Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, authorized and assisted by her husband, in favor of Aimé Gautier, to secure the payment of said note, passed before Armand Pitot, Jr., notary public, on the thirtieth of July, 1872, be and the same are hereby declared and decreed to be null, void, and of no effect so far as are concerned the minor heirs of Eugenie Hacker and Agathe Leromain Hacker, for which minors the said Agathe Leromain Hacker acted as natural tutrix in the granting of said mortgage, as to whom and their property the claim and demand of Aimé Gautier are rejected; that the rights of said Aimé Gautier, whatever they may be, against the successions of Mrs. Agathe Leromain Hacker and the deceased daughter, Mrs. Eugenie Hacker, and against Mrs. Léocadie Hacker, wife of Hamilton N. Gautier, be and the same are hereby reserved; that the injunction herein granted against the executory proceeding by Aimé Gautier be and it is hereby reinstated and made perpetual; and that Aimé Gautier, appellee, pay all the costs of this proceeding in the district court, and in this court. The claim of the plaintiffs in injunction for damages for the alleged wrongful seizure of the mortgaged property is dismissed as in case of nonsuit.

No. 7128.

THE STATE EX REL. NEW-ORLEANS PACIFIC RAILWAY COMPANY VS. FRANCIS  
T. NICHOLLS, GOVERNOR, ET AL.

The Funding Act of the Legislature, approved January 24, 1874, contemplated in its purpose, and embraced in its provisions, only the actual debt of the State. It excluded the contingent liability of the State embodied in the bonds loaned to the Citizens' Bank, and the Consolidated Planters' Association.

In the interpretation of a law the motive of the lawmaker, and the meaning and scope of the law, may be sought for in contemporaneous history, in the discussions attendant on the progress of the legislation, and in subsequent legislation on the same, or on cognate matters.

The constitutional amendment limiting the debt of the State to fifteen millions of dollars only restrains the Legislature from increasing the actual, or present debt of the State beyond that sum. It does not inhibit any increase of the contingent liability of the State.

Until the actual debt of the State has reached the limit of \$15,000,000, it is competent for the Legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided that in the act creating the debt, adequate ways and means are provided for the payment of the current interest, and of the principal when it shall become due.

The act of the Legislature of March 11, 1878, authorizing the issue of bonds of the State in aid of the New-Orleans Pacific Railway Company is not repugnant to the constitutional provision prohibiting aid to a private purpose.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Kennard, Howe & Prentiss, Thomas J. Semmes, John Finney, and Henry C. Miller* for relators and appellants.

*H. N. Ogden*, Attorney General, for the defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The General Assembly at its last session passed an act authorizing the loan to the relator of the bonds of the State to an amount not exceeding two millions of dollars, the first issue of which should be for the sum of two hundred and fifty thousand dollars only, and providing for subsequent issues upon certain conditions being complied with. Acts 1878, p. 105.

The Governor, in approving the act, signified his intention to pro-  
voke a judicial decision upon the constitutional questions involved, and accordingly refused to sign and issue the bonds, whereupon the relator took this proceeding by mandamus to compel the Governor, the Auditor of Public Accounts, and the Secretary of State, to issue two hundred and fifty thousand dollars of bonds of the State in accordance with, and for the purposes expressed in, the act.

The respondents aver that the act is unconstitutional, in that it violates the amendment of the constitution which limits the State debt to fifteen millions of dollars; and because the constitution prohibits the



legislature to contract a debt exceeding one hundred thousand dollars, except in certain specified emergencies, of which this is not one, without at the same time providing adequate means for the payment of the current interest, and of the principal when it shall become due; and further because it is an attempt to use the taxing power of the State to aid a private enterprise.

The Funding Act was approved January 24, 1874. Its object and purpose was to reduce the floating and bonded debt of the State, and to consolidate it by authorizing the issue of bonds, which should be exchanged for all valid outstanding bonds theretofore issued, and for all valid warrants drawn previous to its passage, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and valid warrants. The 13th section enacted, that the entire State debt prior to the year 1914, shall never be increased beyond fifteen millions of dollars, the intent and object of this reduction and consolidation being to restrict the whole indebtedness of the State to a sum not exceeding that sum, and to agree with the holders of the consolidated bonds that this indebtedness shall not be increased beyond that sum during the period mentioned in the act. On the same day an amendment to the constitution was approved, to be thereafter submitted to the people for ratification, declaring that the consolidated bonds, to be issued by authority of, and in conformity to the legislative act of same date, created a valid contract between the State and the holders of them, which the State should in no wise impair; and that whenever the debt of the State shall have been reduced below twenty-five millions of dollars, the constitutional limit shall remain at the lowest point reached, beyond which the public debt shall not thereafter be increased, and that this rule shall continue in force until the debt is reduced to fifteen millions, beyond which it shall not be increased. Acts 1874, pp. 39-43. This amendment has become a part of the constitution by its subsequent ratification by the voters at the polls.

This legislation—the funding bill, and the act proposing the constitutional amendment—followed immediately upon the submission to the General Assembly of the Auditor's report, dated January 1, 1874, wherein is this statement and information.

“The present market value of the actual debt of the State, funded and floating, is about fourteen and a half millions. I have the assurance of large bondholders, at home and in Europe, that if the limit of our debt by constitutional amendment, should be fixed at fifteen millions of dollars, they would accept a new consolidated bond at its face value, and surrender in exchange their old obligations (bonds of all classes and outstanding warrants) at their market value, say about sixty cents on the dollar. The plan of this funding of the State debt is being pre-

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State ex rel. New-Orleans Pacific Railway Co. vs. Nicholls, Governor.

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pared in detail, and will be submitted for action at an early day during the present session."

The sequence of the events, and the conformity of the legislation to the idea of the report, shew that the 'plan' thus referred to is the Act, shortly afterwards passed.

The same Report states the debt of the State at that time to be,

Bonds outstanding January 1, 1874 .....	\$22,433,800.00
Auditor's warrants (old) .....	1,565,702.08
Auditor's warrants (new) .....	225,051.22
Certificates of indebtedness .....	131,785.42
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	\$24,356,338.72

In a tabulated statement appended to the Report, and forming one of the exhibits, the "total amount of the bonded debt of the State for which the State is actually liable," is fixed at the figures above set forth, and there are then itemized other bonds for which the State is contingently liable, amounting to \$4,803,683.33, which with a sum stated as the 'miscellaneous debts' of the State, make up a sum total of thirty millions of dollars. In exact figures, it is that sum, less eight thousand two hundred and seventeen dollars and seventeen cents.

The funding of that sum at the rate suggested by the Auditor, and adopted by the legislature, will create a consolidated debt of eighteen millions of dollars. The funding of the sum, stated by the Auditor as the actual debt of the State, will create a consolidated debt of a little less than fifteen millions.

It is obvious that the 'plan' both of the Auditor, and of the legislature, embraced only the latter sum, or in other words, that it excluded the bonds loaned to the Citizens' Bank and the Consolidated Planters' Association, which amounted in round numbers to the sum above stated, as debt for which the State was only contingently liable. We have therefore to consider whether the expression in the Act of 1874, which restricts the whole indebtedness of the State to a sum not exceeding fifteen millions of dollars, and the expression in the constitutional amendment, which declares that when the debt has been reduced to that sum, it shall not be increased beyond it, so control and define the meaning of the legislature in passing the one, and of the people in adopting the other, as to constitute an unqualified inhibition of any increase of the debt of the State, after the whole, both actual and contingent, has reached the prescribed limit.

A rule of statutory construction, the soundness of which is attested by long use, and the frequent and continuing approbation of judicial tribunals, is that the intent of the law-maker is to be ascertained by inquiring what was his motive in legislating—what was the mischief sought to be avoided or remedied, and what the object or good to be

attained. Contemporaneous history may be resorted to, and the discussions attendant upon the progress of the legislation through its various stages, as well as the *projet* of the law, in order to discover the meaning and scope of the law itself. Subsequent legislation also upon the same subject, or upon cognate matters, is useful as furnishing an interpretation of previous words, and in fixing their import.

Now if we separate the expressions referred to from the act, and ignore the general tenour of the law, and disregard, or refuse to consider, its history and the circumstances attendant upon, and which provoked its birth, so to speak, there could be given but one construction of the phraseology of the thirteenth section of the Funding Act. And that construction is opposed by the history of the legislation, by the intent of its framers as disclosed at every anterior stage of its progress, by the reasons and motives which were assigned as inducements for its adoption, and by arithmetical demonstrations of the basis upon which the consolidated debt was calculated.

It is impossible that the contingent liability of the State, upon the bonds loaned to the Citizens' and Consolidated Banks, should have entered into the 'plan', because funding them with the other liabilities will produce a sum-total, greatly exceeding that fixed by the act and the amendment. It is equally impossible that the State should have contemplated and provided for the compulsory funding of bonds, upon which her liability had not attached, but which must necessarily be contingent for many years after the whole process of funding should have been completed. And we shall advert to this feature further on. In addition to this, we know the exact figures, taken as a basis, upon which new bonds, issued at the rate adopted by the funding bill, will produce the debt-limit, also adopted. You can not reach the end, set in view by the funding legislation, by any other road than that mapped out in the programme of its originators. Diverge from it in search of contingent liabilities at the extremity of one of its by-paths, and you can never reach the end, because you get back into it, burthened with a load which can not be constitutionally put off, and which inexorably stays further progress.

An examination of the action of the bondholders, and of the funding Board, will exhibit a conformity of view as to their understanding of the funding act. This is a summary of the State debt on the first day of the present year, exclusive of the bonds styled 'not fundable', as compiled by the present Auditor.

Consolidated debt January 1, 1878 .....	\$11,279,780.66
Outstanding old bonds when funded .....	392,280.00
Outstanding general warrants when funded...	113,232.55
	<hr/>
	\$11,785,293.21

and this is the total amount of Consols, after every bond and warrant has been funded, the funding of which was contemplated under the theory we have adopted.

But it is said one of the holders of the bonds loaned to the consolidated Planters Association has not acted on this theory, and we have encouraged others to follow his example. Lesassier & Binder have obtained a decree, authorizing the funding at sixty cents on the dollar of three thousand dollars of those bonds. The questions presented in the present case were not considered by us in that case. But suppose all the holders of those bonds should apply to have them funded. The whole amount of them thus loaned, and outstanding, including those in the Lesassier case, is \$506,350.00. Exchange these for consols at the funding rate, and the total debt of the State, exclusive of the loan to the Citizens Bank, is when funded, twelve millions and eighty nine thousand one hundred and three dollars and twenty one cents. (\$12,089,103.21)

If the whole of the two millions, contemplated by the Act of 1878, shall be issued, the debt will be below the constitutional limit, unless the figures and tabulated statements of the auditing officers of the government are incorrect.

It is urged upon the part of the respondents that the question, whether the bonds loaned to the property banks are to be considered as a part of the indebtedness of the State, has been already answered adverse to the theory of the relator, in the opinion read by our immediate predecessors in *Salomon v. Graham*, 23 Annual, 402. But that case was decided in 1871, before the project of funding was conceived—before the ‘plan’, which eliminated these bonds from the debt to be funded, was formed or considered, and of course before that plan was perfected by legislative and constitutional enactment.

The limit then prescribed to the debt was twenty-five millions, and manifestly the word was there used, and was then construed, to include all that could be included in that designation, present or prospective. There had not then been any suggestion or scheme to separate the public debt into two classes, one of which was to be funded, and the other not. The constitutional amendment containing that limitation was not preceded by any act or legislative declaration, shewing that what was meant by the debt of the State was other than its whole indebtedness, however created or arising. The inhibition then was that no future debt should be created that would increase the sum total beyond twenty-five millions. The later inhibition was that no present debt should be funded which would increase the debt, intended to be consolidated, beyond fifteen millions.

So far from that decision militating against the position of the relator, it goes to confirm the idea, that the later amendment had that in

view, and in adopting, as a basis for calculation, the actual debt, to the exclusion of the contingent debt, had in mind the fact that the latter had been judicially construed to be a part of the general debt, and did not provide for it to be funded, because it was contingent.

The Funding Act came under the review of the Supreme Court of the United States in 1875, when the court said ;—"It is contended that the State has deprived itself of the right to issue any bonds at all, except the consolidated bonds created by the Funding Act, to be exchanged for outstanding debts already existing," and this proposition was not mentioned approvingly, although it was not ruled on, being unnecessary in that case, but in the concluding part of the same opinion, the court say in reference to the disposition to be made of the unissued portion of consols ;—"it may be objected to this view, that the bondholders of the State may refuse to come in and make the sacrifice required by the act; and in such case, the State ought not to be for ever precluded from making such other disposition of the unissued consolidated bonds as may be beneficial to it, without being injurious to those who have accepted such bonds. If such a state of things should arise, after due time and opportunity shall have been given to test the practicability of carrying out the scheme, it will undoubtedly furnish proper ground for modified legislation, having due regard to the rights already vested." Board of Liquidation v. McComb, 2 Otto, 531.

Due time has now been given to test the practicability of carrying out the scheme. Four years have passed since the funding bill became a law, and we now know that nearly all the holders of the State's bonds have not refused to come in, but have consented to the sacrifice, and sufficient time has been given to the holders of the residue of the fundable bonds and warrants for them to come in, and share the advantages of the scheme. We also know that the holders of the bonds loaned to the Citizens Bank will not come in, since their bonds are not a part of the debt fundable in consols. Shall the State be forever precluded from making any other disposition of the unissued consolidated bonds that may be deemed beneficial to it by the legislature?

There is not wanting legislation evincing an animus to prevent any part of the fundable debt, which shall remain unexchanged for consols, from being redeemed or the interest upon it paid. It would be difficult to devise an enactment, more stringent or more comprehensive, than that which deprived any officer of the State of the power to assess, collect, or enforce the payment of any tax for the payment of any of the bonds, or the interest thereon, which were contemplated to be funded by the Act of 1874—which prohibited to all courts and judges, or any tribunals, to entertain or take jurisdiction of suits to enforce the payment of such tax—which declared that such tax shall not be recorded by any

officer so as to operate a lien, and if recorded, that it should not operate a lien—which abrogated all penalties for the non-payment of such tax, and declared that the bonds of tax collectors should not cover such tax, and if they collected it, neither themselves nor their sureties should be liable to pay it to any person. And in the same act, to ensure the payment of the new consolidated bonds, principal and interest, and to attract the confidence of the old bondholders to them, they were exempted from the provisions of these copious and all embracing prohibitions. Acts 1874, p. 94.

We have before said that controversy of the policy or impolicy, the good or bad faith, of the Funding Act is closed, because of the numerous and grave complications that would arise upon, and from, the opening of that question. Lord Cecil vs. Board of Liquidation, *ante* 35. We regard the faith of the State as irrevocably pledged to the payment of her consolidated bonds, issued under authority of that act, and to the payment of such other bonds as may be issued under the sanction of the decree we shall make herein. The contract with the holders of these bonds, is one which, in the language of the constitutional amendment, the State can by no means and in no wise impair. This utterance, fortified by judicial sanction, contains the double assurance to the bondholders, that their securities shall not be impaired or imperilled, and to the tax payers, that their burthens shall not be augmented beyond the constitutional limit. Until the actual debt of the State has reached the limit of fifteen millions of dollars, exclusive of the contingent liabilities which were not embraced within the Funding Act, and the constitutional amendment, it is competent for the legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided other requirements are complied with, and we shall now proceed to the inquiry whether these requirements have been complied with in the present instance.

Has the legislature complied with the constitutional requirement of providing in the law creating this debt adequate ways and means for the payment of the current interest, and of the principal when it shall have become due. The relator is required by the Act to deposit its own first mortgage bonds with the Auditor, and to pledge them to the State, for the guarantee of the payment of the State bonds which shall be issued, to an amount exceeding by one fourth the amount of the State bonds delivered to the Company. The whole amount of bonds to be issued by the company is restricted to five millions, one half of which will be thus pledged for the redemption of the State bonds, in the event the full issue of the latter authorized by the Act is made, and this restriction is evidently made to prevent the weakening the security which the State has required for her protection. Fifty thousand dollars of the State bonds

are to be extinguished annually by the company, commencing five years after the completion of its line to Shreveport, and this annual rate of extinguishment is to continue until the near approach of the maturity of the State bonds, when they are to be extinguished in such annual proportion as shall ensure the payment and cancellation of the whole of them by their maturity.

It may be that these salutary precautions will not completely ensure the object for which they are made. Human affairs depend upon too many contingencies to enable the wisest individual, or the most prudent public Body to concert a scheme, which is to be practically worked out in the future, and provide with unerring certainty for the attainment of specific results. The legislature has provided the 'adequate means' in the constitutional sense.

The third and last objection to the constitutionality of the Act is, that the State has not the right to assume or create a debt, which must eventually be met by the use of her taxing power, in aid of an enterprise of this kind.

The argument is that this enterprise is *private*, as contradistinguished from *public*, and hence that the public money cannot be rightfully appropriated to its aid. The discussion of this question was at one time practically useful, as well as theoretically interesting. Nearly all the States, if not quite all, have been at one time or another violently agitated by this controversy, and when the arena of conflict was transferred from the hustings to the courts, each side found ample grounds to fortify it in its opinions. There was rarely an unanimous court in pronouncing a judgment for or against the power, and opinions are yet divided between the disputants as to what should have been the judgment pronounced. But as a practical question, it no longer has any interest. The battle over it has been fought, and has been lost by those who denied the possession of the power. A judge, who took pains to collate the information, says the legislation has been sustained in nineteen out of twenty-one States. Swayne, J. in Talcott's case, 19 Wall. 666.

It may now be regarded as settled doctrine in this country that no tax can be legally authorized for a purpose which is private, or to put it in another form, for a purpose which is not public. It is not however quite plain always what is a public purpose, but the great preponderance of judicial judgments is in favor of the competency of a legislature, in the absence of constitutional restraint, to authorize loans to railway companies, and to provide for their payment by the issue and sale of bonds. But a statute which authorizes the issue of bonds, to be redeemed by taxation, in aid of classes or individuals, or in aid of manufacturing enterprises of individuals or private corporations is void, because it falls within the meaning of the rule which prohibits aid to a

private, as contradistinguished from a public purpose, although the local public might be benefitted thereby in a collateral way. Dillon, Munic. Corp. §586-591. Monograph Munic. Bonds, 2 South. Law Rev. 438.

The bonds authorized by the Act of March 11, 1878, fall within the former class, and the provision for issuing them, under the conditions therein imposed, is not repugnant to the constitution. Therefore,

It is ordered, adjudged, and decreed, that the judgment of the lower court is avoided and reversed, and that the mandamus be made peremptory, ordering the signing of bonds of the State to the amount of two hundred and fifty thousand dollars, and their delivery, to the relator, upon compliance by the relator with the conditions of the above named Act, and that the respondents pay the costs hereof.

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DISSENTING OPINIONS.

EGAN, J. However important the interests to be advanced by the decree in this case, as manifested by legislative action, I am unable to agree with the conclusions arrived at by a majority of the court. In my opinion the fact that the property bank bonds are secured collaterally to their full amount does not make them any less a part of the debt of the State nor their obligation upon the State any less binding. It may be that those securities may prove ample for their redemption, or they may not. In this day of wonderful reduction of values, whereby fortunes heretofore deemed large disappear as if by magic, and contrary to all reasonable human calculation, we are daily taught the instability of all securities. In what situation, let me ask, will the State be placed if to-day we authorize and decree the issuance of two millions of new bonds of the State, and to-morrow, or a few years hence, she is called upon to redeem her solemn unconditional promises to pay the property bank bonds. What barrier and what defense is to be interposed? Surely not the existence of these new obligations of the State which swell its liabilities beyond the constitutional limit; and if not, then the practical consequences of the violation of its contract and of the constitutional amendment will have to be met by the State amid many embarrassments. Should a contest arise between the holders of the consolidated bonds and those of this new issue, notwithstanding the present decree, what must be its inevitable result? But however much these considerations might induce us to pause at the possibility of the State and the holders of its obligations being placed in such embarrassing position, this is not the question now. The sole question is whether the contemplated issue in favor of the relator will be in excess of the limit placed upon the State debt by the constitutional amendment of 1874.

In my opinion the reasoning of the court and its decision in the



case of the State ex rel. Salomon & Simpson vs. Graham, Auditor, 23 An. 402, is as applicable to-day as when it was rendered *as to what constitutes "the State debt,"* and is unaffected by the fact that the late amendment has reduced the limit of that debt below that then existing. It was then held that the property bank bonds constituted and must be counted and considered as part of the debt of which they have all the characteristics, form, and obligations. The opinion and decree even of the present bench in the case of Lesassier & Binder vs. the Board of Liquidation is in accordance with the same view. That suit was brought under the provisions of the funding bill upon some of these very property bank bonds, and by our decree we declared them to be debts of the State, possessed of all the qualities and characteristics which entitle them to be funded, and it was not even attempted to be urged as a defense that they were not fundable, for the reasons now urged. In point of fact, we know from current history that the same view is taken by the Funding Board itself since the last quoted decision. If so, then what becomes of the argument derived from the amount of consols provided for by the funding bill and the amount of the State debt as estimated at the time of its adoption? Whatever the errors in those estimates, the terms of the amendment were made no less absolute, and the interests of those dealing with the State can not be affected by such error in the motive for the self-imposed curb on its power to incur debts. If argument is to be drawn from that source and from the acts and motives of the Legislature and the circumstances which gave birth to and attended the legislation on this subject, why should we shut our eyes to the historic and important fact that in that unhappy period in the history of the State which originated the necessity and led to adoption of the funding scheme many and large issues of bonds were made which were known to be outstanding and included in the estimates of the amount of the State debt which were more than suspected of having been fraudulently or illegally issued, and many of which were contested by the Attorney General and Auditor, and that large classes and amounts of bonds were in the opinion of the Legislature itself, as declared in the supplemental funding bill, proscribed and prohibited from being funded without prior judicial inquiry and sifting of their character and basis. From these facts it is evident that the Legislature expected and had good reason to expect that enough of what was estimated as forming part of the State debt would be rejected on such judicial inquiry to reduce it when funded within the fifteen million limit, or even below it, but which possessing on their face all the characteristics of obligations of the State, and being supported by the form of legislation, are and must continue to be included in all estimates of State liabilities until the contrary is decided.

Again, what was the funding bill but a new contract tendered by the State to its creditors, which they might or might not accept for reasons satisfactory to themselves; as for instance in the case of the holders of the property bank bonds, because they might consider the existing security sufficient for their ultimate redemption to their full amount. That this was a reasonable and probable view of the matter is made the more manifest by the fact that up to this time after the offer and opportunity has remained open for several years, less than twelve millions of the consolidated bonds have been applied for or issued. This then disposes of the argument drawn from the relative inequality of the estimated State debt with the addition of the property bank bonds and the amount of consolidated bonds provided for. But aside from the foregoing considerations, the language of the constitutional amendment placing a limit upon the amount of the State debt is plain and unambiguous, and its letter can not be disregarded under the pretext of pursuing its spirit. C. C. art. 13. The amount of issue was however under legislative control should that provided for be found insufficient.

I can not, therefore, assent to the force of the arguments arrayed in the opinion of the majority of the court drawn from their view of what was the legislative intention in proposing or that of the people in adopting the constitutional amendment. In point of fact, however, it is well known that the relative amount of debt and new issue of bonds provided for was little known or considered by the people at large in adopting the amendment, and that they were readily inclined to place a check in the form of a constitutional amendment upon the spoliations to which under the forms of law they had been of late so freely subjected. They accepted the amendment according to its plain letter and the evident meaning of its language. Is it then surprising if the large class of foreign and non-resident holders of the State bonds have accepted or should interpret the funding bill and the constitutional amendment to mean what it says? That "the whole State debt" should not be increased beyond fifteen millions before the time fixed in the amendment? This view alone seems to me consistent with the preservation of the public faith, upon which the whole credit of the State rests, and which it is all important to keep sacred. I am, however, consoled by the reasoning by which a majority of the court have reached their conclusions, and by the consequence of that reasoning and view of the question, that it manifests careful regard for the public faith and obligations, and only determines that the limit of fifteen millions of State debt, as contemplated by the amendment, *has not been reached*, and *not* that it shall be overstepped; and also by the fact that the bonds to be issued to the relator *do not and can not participate* in the benefits secured to the consolidated bonds issued or to be issued under the funding bill, as they are themselves not fundable.

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State ex rel. New-Orleans Pacific Railway Co. vs. Nicholls, Governor.

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It has been argued that the State has the power and right to withdraw its offer to fund, which can not be required to remain always open. Concede that this is so, it is sufficient answer to say that the State has not withdrawn its offer, but on the contrary still continues the functions of the funding board, and makes appropriation for its expenses; and that so far from the discontinuance of funding, it has gone on since the passage of the act relied on by the relator, and is going on as we write. The fact then still remains that the consolidated bonds are so secured and guarded that they should, and no doubt will, with a reviving prosperity, to which it is hoped the project of relator will largely contribute, soon be ranked among the best of public securities. Believing, however, as I do and as the court has decided, that the property bank bonds are absolute and unconditional, and not, as argued, mere *contingent* obligations of the State, and the amount of the (it being conceded counting them outstanding) State debt at the time of the passage of the act providing for the issuance of the bonds for the benefit of relator was or would thereby be made in excess of the constitutional limit, I dissent from the decree in this case.

DEBLANC, J. I concur in the dissenting opinion of Mr. Justice EGAN.

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No. 6831.

THE STATE VS. CHARLES ROLLE.

The law imposing a smaller license tax on proprietors of bars, or drinking saloons, kept on steamboats owned and registered in this State, than on the owners of bars kept on land, does not violate the clause of the constitution prescribing equality, and uniformity of taxation.

**A** PPEAL from the Fourth Justice of the Peace, parish of Orleans.  
*Hernandez, J.*

*Jas. C. Egan*, Assistant Attorney General, for plaintiff and appellee.  
*Frank D. Cretien* for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant has appealed from a judgment condemning him to pay to the State, as keeper of a bar-room a license of \$85—as a grocer one of \$15. The first mentioned of these licenses—that of \$85—is claimed under section ten of act No. 14 of 1872, which reads as follows:

“From the proprietors of all coffee-houses, bar-rooms, beer-saloons or gardens \$85: from the proprietors of *all bars kept on steamboats, owned and registered in this State* \$50.”

Defendant resists the payment of the license of \$85, on the ground that the section of the act of 1872, under which it is levied, discriminates between those who carry on land and those who pursue on water what he considers as being but one and the identical occupation.

In his book on Taxation, Burroughs says : that—except in only one of the States—the provisions as to equality and uniformity do not apply to taxes on licenses, whether those provisions be mentioned in the constitution or not, p. 167. The license is granted by the State under its police power: it is a personal privilege—not a contract: the tax paid is not regarded as the consideration which moves the granting of the privilege, which may be revoked, annulled or amended at the pleasure of the Legislature. Burroughs—p. 148, 392, 393.

It is true that, whether pursued on land or on water, the calling itself is the same; but, that in its exercise and results, one is different from the other, there can be no doubt: on water, the bar is entirely under the control of the officers of the boat, they can—according to circumstances—prevent or forbid the keeper from opening it, regulate or order its closing. Their interest is to check intoxication, restrain extravagant drinking and preserve quiet on the boat: on land it is otherwise; every one enters the coffee-house, and—far from restraining—the bar-keeper is generally disposed to encourage the abuse of intoxicating liquors, and often that abuse breeds disorder, violence and crime. Burroughs, 392, 393.

In its form, and in many of its effects, the bar-room on a steamboat is distinct from the bar-room on land, and—as the State has the power of dividing into classes the objects of taxation, the distinction which exists between those bars, justifies the difference made in the price of the licenses. 29 A. 283; 30 A.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Burroughs on Taxation, page 69.

No. 5964.

LOUIS SCHWARTZ VS. GEORGE CRONAN ET AL. GEO. A. FOSDICK & Co.,  
INTERVENORS.

80	998
105	899
105	758
105	755
80	998
111	217

A contractor who furnishes materials for a building and fails to record his contract, acquires no lien on the building, and the lot on which it is erected, and hence, no creditor of his can acquire such a lien from him, either by subrogation, or in any other way.

No amendment of the judgment below will be made in favor of the appellee which he has not specially asked for.

One who sells to a contractor the raw materials which are actually used by the contractor, in a manufactured form, in constructing certain portions of a building, and who has served on the owner of the building an attested account of the amount due him by the contractor, is only entitled to recover from the owner such an amount of the sum due by the owner to the contractor, as has been adjusted, ascertained, and fixed, in some one of the modes pointed out by sections two and three of article 2772 of the Civil Code. Such a furnisher of raw materials can acquire no lien, or privilege, except as subrogee to such privilege as the contractor may have acquired and preserved.

**A** PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

*Chas. S. Rice* for plaintiff and appellee.

*Thos. Gilmore & Sons* for defendants and appellants.

*Singleton & Browne* for intervenors and appellants.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover the balance of an account alleged to be due for materials furnished to Cronan, and used in the construction of St. Patrick's Hall.

The petition charges that the St. Patrick's Hall Association is indebted to Cronan under the contract with him in an amount exceeding plaintiff's demand; and that plaintiff served on the association a duly certified statement of the materials furnished by him, and caused registry of the same to be made in the office of the recorder of mortgages. The prayer is for judgment against Cronan and the association, *in solido*, with lien and privilege on the building known as St. Patrick's Hall, and the ground on which it stands.

Cronan admits that he purchased the materials, but denies that he is indebted for them; and he specially denies that plaintiff has any privilege or preference. The association pleads a general denial; and specially denies that plaintiff has any privilege as claimed by him.

Fosdick & Co., by intervention and third opposition, claim to be paid by preference the balance of an order given by Cronan to them, on the tenth June, 1874, payable out of the money coming to him for work done and materials furnished for the building, alleged to have been accepted by the association, verbally, on the day of its date, payable

whenever Cronan should be entitled to the amount free from any privilege or lien claims against him on the funds.

To this petition Cronan and the association answered by general denial. Schwartz in his answer alleges that the order relied upon by intervenors has no legal existence; that it was given without valid consideration; that it has not been accepted by the association; and that intervenors ought not to be paid out of the money in the hands of the association in preference to him.

There was judgment in favor of Schwartz, against Cronan, for \$301 38, and against the association for \$500, with privilege on the funds in the hands of the association on the 8th August, 1874, due to Cronan; and the residue in the hands of the association was reserved for ulterior adjudication. Fosdick & Co. and the association appealed separately; and Schwartz, in answer to the appeal, prays that the judgment may be so amended as to decree in his favor against the association the full amount of his demand, with lien and privilege on the funds belonging to Cronan, under his contract, in the hands of the association on the eighth August, 1874; and that "in other respects the judgment of the lower court be affirmed."

The account sued on was sufficiently proven as against Cronan; and the order relied upon by intervenors was shown to have been given in settlement of a judgment in their favor, rendered against Cronan in January, 1874. This order was given to the attorneys of intervenors. It was presented by them to John Henderson, the vice-president, who represented and acted for the association in all that pertained to the building of the hall. Henderson verbally accepted the order in the terms alleged, and it was left with him for payment; and he afterward made the two payments on account of it, as stated in the petition.

Cronan undertook to furnish certain iron work for the building, to put up the railing of the galleries, and to furnish mechanics to bolt and secure his cast iron work on Camp street, whatever that may have been, for the gross sum of \$5070, without specification of the price of the several parts, except, so much for the cast-iron work, and so much for the wrought-iron work. There was no agreement as to when any part of this work was to be commenced or completed, nor as to when or how the payment was to be made. His agreement, such as it was, was not registered in the office of the recorder of mortgages; and, therefore, he was entitled to no privilege, and Schwartz could derive none from him by subrogation, or otherwise.

The privilege which the law grants to undertakers, workmen, and the furnishers of materials is, specifically, on the building and the lot of ground, not exceeding one acre, on which it is erected, R. C. C. 2772, 3249; and this is precisely the privilege which plaintiff asserted, and

sought to have enforced. We are relieved of the necessity of inquiring whether plaintiff had acquired and preserved this privilege in his own right, under articles 3249, 3272, of the R. C. C., because the judgment of the district court did not allow him this privilege, but accorded him a privilege on the money due Cronan, in the hands of the association, on the eighth August, 1874, the date at which plaintiff's claim seems to have been registered in the office of the recorder of mortgages, and at which he delivered a statement of his account to the president of the association. Plaintiff did not appeal from this judgment; and in his prayer for amendment of the judgment he asks that he may be allowed the same privilege on the money for the whole amount, instead of for part only of his demand; and that the judgment appealed from be in other respects affirmed. This is an acquiescence in the judgment disallowing the specific privilege asserted and demanded in the petition; and, while we incline to the opinion that he had no privilege on the building and lot of ground on which it is erected, we go no further now than to say that we have no power to review the judgment in so far as it disallows that privilege, because plaintiff did not appeal; and because of his prayer for the affirmance of the entire judgment, except as to the amount allowed him against the association.

Cronan was not an undertaker, in the ordinary sense of the term. St. Patrick's Hall was not built by an undertaker of the entire work. The different parts were done by persons whose bids or offers were accepted; and Cronan's bid for cast and wrought iron work to be used in the construction of the building, and for putting up the railings of the galleries, was accepted. In great part his undertaking was to furnish materials which those who constructed the building were to use and put in place.

Schwartz did not deal with the association. He sold to Cronan, at different times, in April and May of 1874, sundry lots of old iron, principally cast iron, which was not in a condition to be used in the building. The testimony makes it quite uncertain as to what part of the iron sold by him to Cronan was used in the building; but so much of it as was applied to that purpose was melted at Cronan's works, just as if it had been pig iron, and was cast into the shapes and patterns required in the construction of the building. He is to be dealt with, therefore, as the furnisher of raw material to a manufacturer who wrought and fashioned it into the perfected material which he, the manufacturer, had undertaken to furnish to the owner, to be used in the construction of the building.

Under the Code, the person who has contracted with the undertaker, and not with the owner of the building, has these remedies:

1. By art. 2770 of the R. C. C. masons, carpenters, and other work-

men, those who, in the language of Troplong, have done *un travail manuel* in the construction of a building, may bring a direct action against the owner, and may recover of him up to the amount which may be due by him to the undertaker at the time of the commencement of their action.

This article was copied into the Code of 1808, page 386, article 78, from the Code Napoleon, article 1798; and it was incorporated in the Civil Code of 1825, as article 2741, and in the R. C. C. as article 2770, without change. By its terms it does not include the furnisher of materials; and the French commentators and jurisprudence agree that he is excluded from its benefits. Troplong, *Échange et Louage*, 3, p. 260, number 1052; Marcadé, 6, p. 545; Guesdon c. Nannet, Sirey & Villeneuve, 1846, part 2, p. 262. It is a remarkable fact that neither the Code Napoleon nor the Louisiana Code of 1808 granted any privilege to the furnisher of materials. The Code of 1825 granted him a privilege only where he supplied the owner with materials which were actually used in the work. C. C. article 3216, number 3. It would seem from a comparison of this article with article 2743, R. C. C. article 2772, that a privilege on the building was allowed only to those who were employed directly by the owner, who contracted with him.

2. By article 2773, which is copied from the Code of 1825, article 2741, workmen, and those furnishing materials, who have contracted with the undertaker, may cause the moneys due him by the owner to be seized; and they are, of right, subrogated to his privilege on the building. By article 2774, this right of seizure extends to payments which the owner may have made to the undertaker by anticipation, that is, in advance of the time of payment fixed by the contract between the owner and the undertaker. See Baldwin's case, 11 La. 453.

3. As the furnisher of materials is not included in the terms of article 2770, Schwartz could not have brought suit under that article; and as Cronan, with whom alone he dealt and contracted, had no privilege, Schwartz acquired none from him by subrogation; and, therefore, he could have proceeded under article 2773 only by seizing in the hands of the association the moneys due to Cronan, including any payments the association may have made to Cronan in anticipation. As Schwartz did not proceed under this article, he is remitted to the act originally passed in 1844, re-enacted in 1855, and in the Revised Statutes of 1870, and incorporated in the R. C. C. as an addendum to art. 2772.

This Act was entitled originally "An Act to amend article 2744 of the Civil Code, to promote the better security of mechanics and others erecting buildings or furnishing materials, in the State of Louisiana." 1844, page 34. In 1855, page 327, it was re-enacted under the title, "An Act relative to mechanics' lien." In the Revised Statutes, it is placed in the title "privilege," under the heading, "enforcement of mechanics'



lien," p. 561, sec. 2879 *et seq.*; and in the R. C. C. it is inserted between article 2772, which was article 2743, and article 2773, which was article 2744. This whole matter would have been greatly simplified if the original design of the Legislature had been carried out, and this act had been accepted and treated as an amendment to article 2744; and if articles 2741, now 2770, and 2745, now 2774, had been stricken out and omitted in the Revised Civil Code. We must take the law as we find it, not as we think it ought to have been, and endeavor to ascertain the rights of litigants, in accordance with its terms and provisions.

The first section of this act authorizes workmen, etc., employed by a contractor, to deliver to the owner an attested account of the work they have done, and for which they have not been paid; and, thereupon, such owner shall retain, out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing, etc.," and section five extends all the provisions of the act to the furnisher of materials.

Section two makes it the duty of the owner to furnish his contractor with a copy of such attested accounts, in order that, if there be any disagreement between the contractor and these workmen and furnishers of materials, his employees and creditors, it may be adjusted amicably between them, or by arbitration. In case of failure of the contractor within ten days after the receipt by him of such copies to give the owner notice that he intends to dispute the claim, or if, in ten days after giving such notice, he shall refuse or neglect to have the matter adjusted, he shall be considered as assenting to the demand and the owner shall pay the same when it becomes due.

Section three provides for the adjustment of these accounts, and the ascertaining and fixing of the amount due, in case of dispute, by arbitration, on the agreement of the parties to submit the matter: the award of the arbitrators, in writing, to be final and conclusive.

Section four provides that, whenever the amount due shall be adjusted, as provided in sections two and three, if the contractor shall not within ten days after it has been so adjusted and ascertained pay the sum due to the creditor, with the costs incurred, the owner shall pay the same out of the funds, as provided; and the amount due may be recovered from the owner by the creditor of the contractor, and the creditor shall be entitled to the same privileges as the contractor, to whose rights the creditor "shall have been subrogated," to the extent in value of any balance due by the owner to the contractor, under the contract with him, at the time of the first giving of the notice, or subsequently accruing to the contractor, if such amount shall be less than the sum due from the contractor to his creditor.

Section six defines the payment by anticipation to be that which is

made by the owner to the contractor in advance of the sum due on the contract; and if the amount still due the contractor after such payment shall be insufficient to satisfy the demand made for work and labor done, or materials furnished, the owner shall be liable to the amount that would have been due at the time of his receiving the account, in the same manner as if no such payment had been made.

There is some difficulty in construing this act, and in applying it to the case under consideration:

1. By the terms of section one it seems to be limited to those cases in which the building is constructed under a contract between the owner and the builder, or other person undertaking the whole work. As this is a remedial statute it should be construed liberally; and it would be but reasonable to apply it to all building contracts, whether the different parts are undertaken by different contractors, or the whole work is undertaken by a single contractor. St. Patrick's Hall was not undertaken by a single contractor; and the claim of Schwartz is for raw material sold by him to a person who had contracted to furnish a large amount of manufactured, perfected material, and to do but a very small part of the work of construction. In a letter addressed to the president of the association by Cronan, April 8, 1874, containing his entire proposition, which was accepted, and became the contract between him and the association, he says:

"In my bid I propose to put up the railing of the galleries, and to furnish mechanics to bolt and secure my cast-iron work on Camp street front. The balance of the work can be placed as they progress."

He then gives a detail of the cast-iron work, without any mention of the prices, or reference to any labor to be done, ending with a statement of the gross sum, total price, \$3144 95. This is followed by a detail of the wrought-iron work, without mention of prices, or reference to work or labor to be done, closing thus: "Total, \$2455 05. Cast-iron, \$3144 95; wrought-iron, \$2455 05; total, \$5600. Less estimated deduction in size, etc., of above mentioned wrought-iron work, etc., details of which I left with Mr. Freret, \$530. Bid now stands \$5070, with alterations and amendments above stated.

"Accepted.

"(Signed)

GEORGE CRONAN,  
JOHN HENDERSON."

The price or value of the work and labor to be done was manifestly small, and was included in the gross price of the material; so that it can not be ascertained from the contract.

The testimony shows that Cronan used some part of the iron purchased of Schwartz in work for other persons: that he purchased \$500 worth of iron at one time from Schwartz, for which he paid cash; and

that this iron was used for St. Patrick's Hall. That he purchased iron from other persons; that the raw material was dumped at his foundry confusedly, and put into the furnace and cast confusedly; that no account was kept at the foundry by which it could be shown what part of each purchase of raw material was used for any special work; and that it could not be stated otherwise than approximately what part of the iron mentioned in the account or statement of Schwartz was used for the perfected material furnished by Cronan to St. Patrick's Hall.

It also appears that Cronan paid Schwartz \$200, credited in the account under date May 16. Cronan says this payment was for material used by him for the hall; and, according to his estimate, not more than \$300 to \$400 worth of the iron charged in the account of Schwartz was used for the work on the hall, on account of which he paid the \$200.

If it be conceded that Cronan was such a contractor, and that Schwartz was such a furnisher of materials as the act contemplates, it seems clear that the statement, or "attested account," to be delivered to the owner of the building must be limited to the materials furnished to be used and actually used in the work done on the building; and that it is not a compliance with the law to deliver to the owner an account the greater part of which is for materials used for other purposes.

2. Sections 2, 3, 4, of the act, contemplate and provide for those cases only in which the owner of the building, having received the attested account, furnishes a copy to the contractor; and the amount due by the contractor is adjusted, ascertained, and fixed, either by the failure of the contractor to give the owner notice of his intention to dispute the claim; or by amicable arrangement; or by arbitration; or by the neglect or refusal of the contractor to have the matter adjusted. It is evident from the mere reading of section four that the action which it authorizes the creditor of the contractor to bring against the owner is for the recovery of the amount, as it has been adjusted, ascertained, and fixed, in some one of the modes pointed out with so much precision in sections two and three. It does not authorize or enable the creditor to sue the owner for any other sum or amount, nor for this precise sum, until, by this preliminary adjustment and final and conclusive fixing of the amount, as between the contractor and his creditor, the contractor shall be in default by failing to pay the sum due within ten days.

In the erection and finishing of a large building, under a contract with an undertaker of the whole work, there might be several hundred persons, many of them creditors for small amounts, who would come within the comprehensive terms of the act, furnishers of materials, mechanics, workmen, journeymen, laborers, cartmen, sub-contractors, and other persons doing or performing any work toward the erection, construction, and finishing of any building, etc., all of whom might deliver

attested accounts to the owner ; and it would require no small amount of clerical labor and of time to make copies of such accounts, and to furnish them to the undertaker. This labor would be increased in case there were several different contracts for the different parts of the work. If, from any cause, the owner should fail or not choose to take upon himself this burden, the act has made no provision for any other means of effecting a compulsory adjustment, or of putting the undertaker or contractor in default. It might have been well for the Legislature to have required the creditors themselves to deliver copies of their attested accounts to the undertaker, and thus to have enabled them to compel a speedy adjustment, as between the undertaker and themselves, and to recover, with the least delay practicable, the money due them for wages or materials, with or without suit.

As the act itself has not provided for the failure or refusal of the owner to assist these creditors of the undertaker in the adjustment and recovery of the amounts due them, the only consequence is that they can not avail themselves of the remedy, because the prescribed conditions upon which depends the right to resort to that remedy have not been realized ; and they must seek redress by some other means.

Articles 2741 and 2744 of the Civil Code were in force at the time the act of 1844 was passed ; and they figure in the Revised Code, without change or amendment, as articles 2770 and 2773. Article 2770 is limited to "masons, carpenters, and other workmen ; but article 2773 includes "workmen, and persons furnishing materials." These articles and the act of 1844 all relate to persons employed by and contracting with undertakers. The act of 1844 instead of appearing as an amendment to article 2773, corresponding with article 2744 of the Civil Code, is a part of article 2772, which was 2743 of the Civil Code.

The first clause of article 2772 gives the undertaker a privilege on the building ; and the second clause gives the same privilege to workmen employed immediately by the owner. Then follow the six sections of the act of 1844, as clauses of this article which relate exclusively to those who have contracted with the undertaker. No privilege is given them on the building, except as subrogees of the undertaker. They may acquire a right of action against the owner directly ; but only, *ex vi termini*, when the conditions prescribed by that act have been fulfilled.

Then follows article 2773, which was 2744 of the Civil Code, which declares that "workmen, and persons contracting with the undertaker, have no action against the owner who has paid him. If the undertaker be not paid, they may cause the moneys due him to be seized ; and they are of right subrogated to his privileges."

The compilers of the Code probably foresaw that cases would arise in which workmen and furnishers of materials would not be able to

avail themselves of the right of action conferred by section four of the act of 1844, clause six of article 2772 of the R. C. C., by reason of the failure to have an adjustment and fixing of the amount due by the contractor, and the consequent inability to put him in default, a pre-requisite to suit against the owner; and they, therefore, retained article 2770, which gives the right of action to "masons, carpenters, and other workmen," which is limited to the amount due by the owner to the undertaker at the time of the commencement of the suit. This article would afford no relief to the furnisher of materials; and so they retained article 2773, which includes "workmen, and persons furnishing materials."

The action which is authorized by article 2770 is against the owner: the action authorized by the act of 1844 is against the owner; but the action authorized by article 2773 is against the undertaker, and the owner is made party by the seizure in his hands. Neither article 2773 nor the act of 1844 gives to the person who has contracted with the undertaker any lien or privilege, except as subrogee to such privilege as the undertaker may have acquired and preserved. The act of 1844, section four, gives the creditor the same privilege as the contractor is entitled to, and none other. The whole theory of this act is that where the workman, etc., has brought himself within its terms, the owner of the building becomes his debtor, and may be sued directly, and compelled to pay the amount ascertained, as provided in sections two and three, to be due to him by the contractor, up to the amount due and to become due by the owner to the contractor. If the contractor has taken the precaution to preserve the privilege accorded to him by law on the building, the workman, etc., will be secured by that privilege as legal subrogee; but, otherwise, that act gives him no privilege. The act entitles the creditor, workman, or furnisher of materials to be paid out of the money due and owing to the undertaker; but neither the act nor any article of the Code gives any privilege on the funds in the hands of the owner, except where the creditor, by the adjusting of his account, is entitled to sue and to recover of the owner.

Plaintiff has not brought himself within any law authorizing him to proceed by direct action against the association; nor conferring on him any privilege on the funds of or money due to Cronan in the hands of the association.

Precisely at what time the draft of Cronan, sued on by intervenors, became exigible we are not informed; but it operated a transfer of so much of the money in the hands of the association due to Cronan, from the date of the acceptance. Two payments, one of \$350, September 12, 1874, the other of \$450, May 10, 1875, have reduced the amount to sixteen hundred and sixty-one dollars and thirty-two cents (\$1661 32).

There is no prayer for interest in the petition ; and we think substantial justice will be done by allowing interest from judicial demand, under the prayer for general relief.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court, except that part of it which is in favor of Louis Schwartz against George Cronan, which was not appealed from and is not to be disturbed by this decree, be annulled, avoided, and reversed ; that the demand of Louis Schwartz against St. Patrick's Hall Association be rejected with costs ; that George A. Fosdick & Co., intervenors, do have and recover of and from the St. Patrick's Hall Association the sum of sixteen hundred and sixty-one dollars and thirty-two cents (\$1661 32), with interest at the rate of five per cent per annum from the tenth of June, 1875, until paid, to be paid out of the funds or money in the hands of the association due and owing to George Cronan for work and labor done and materials furnished by him toward the building of St. Patrick's Hall ; and that Louis Schwartz pay the costs of defendant, the St. Patrick's Hall Association, and of the intervenors, George A. Fosdick & Co., in the District Court, and all the costs in this court.

No. 6848.

SUCCESSION OF R. H. WOODS. ON OPPOSITION OF CHUBBUCK ET AL.

Where, in consequence of an agreement between the attorneys of a succession, and of its opposing creditors, entered into to prevent the record of appeal from being too bulky, certain necessary papers have been accidentally omitted, a writ of *certiorari* will be allowed to supply them.

No loss suffered by a stockholder, in consequence of a call authorized by the charter of the corporation, made upon each stockholder to pay a proportion of the price due on his stock, will give rise to a claim for damages against the directors of the corporation.

The contents of a written promise, or admission can not be proved by parol, until its destruction, or its loss, and proper efforts to recover it, have been shown.

A stale demand for unliquidated damages on the succession of a deceased, on account of an alleged tort of the deceased, and never made during his life, will not be allowed, except on the strictest proof of its justice.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*E. C. Kelly* and *Chas. S. Rice* for administratrix and appellee.

*T. A. Bartlette* for opponents and appellants.

The opinion of the court on the motion to dismiss and on the application for a rehearing was delivered by MANNING, C. J., and on the merits by EGAN, J.

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Succession of Woods.

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## ON MOTION TO DISMISS.

MANNING, C. J. Hornor & Benedict, acknowledged creditors on the account of the representative of this succession, move to dismiss this appeal for the absence from the record of certain papers which they allege constitute a part of the record, and that they were not parties to the agreement between the attorneys of the succession and of the opponents specifying what papers should constitute the record.

The papers specified as necessary to make a proper and intelligible record have been supplied since by a writ of certiorari. The agreement to select such papers out of the mass as would be necessary to present the issue between the opponents and the succession was evidently made to save costs, and to save this court the useless labor of reading numerous documents and proceedings, irrelevant to the issue, and not necessary to a comprehension of the matters for decision. We should be sorry to thwart or discourage so laudable a purpose by inflicting a punishment upon those who conceived it.

The representative of the succession, who had judgment below, does not move the dismissal, and the grounds upon which it is asked by the movers are insufficient.

The motion to dismiss can not prevail.

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ON THE MERITS.

The opinion of the court was delivered by

EGAN, J. The opposition of Chubbuck is not in the record, although opportunity to perfect it in this and other respects has been afforded. As, however, the substance and nature of it is set forth by the counsel on both sides, and the record affords the means of passing upon it intelligently, we will proceed to do so. It appears that decedent was book-keeper and cashier of the Loan and Pledge Association, and by virtue of the latter office a director, also. One Mahan was a stockholder, who, it is alleged, desired several years ago to transfer his stock, and was prevented or not allowed to do so by the president and by the deceased, who, as a director or other officer, also joined in a call of ten per cent on all outstanding stock, whereby it is alleged the stock was greatly depreciated, and heavy loss resulted to the said Mahan, whose stock was afterward bought up by the association or its president, Benton, at greatly reduced price. Subsequently, in 1874, the opponent purchased at sheriff's sale for the price of *twelve dollars* all the rights and claim of F. C. Mahan, of whatever nature, against said Loan and Pledge Association or Accommodation Bank (as it was sometimes called), and against any and all of the directors thereof, in either their official or

individual capacity, in consequence of any of their acts in connection with him and with said company, and now wages this opposition, and claims unliquidated damages against the succession of Woods, as the transferee of Mahan by virtue of his purchase at the sheriff's sale. The demand is, to say the least of it, a stale one, and when urged in this form after the death of Woods requires to be supported by strict proof. The district judge thought, and we agree with him, that such evidence was not offered or given. We have recited the precise description given in the sheriff's deed, or *procès verbal*, of what was acquired, from which it appears that the particular claim now relied on was not named or described. It is very questionable if a claim for damages in the nature of a tort would pass under such description, even if more minute, and whether it would not be confined at most to claims and obligations growing out of some *legal* act or pact, and not from "*délits or quasi délits*." Were it, however, otherwise, it is by no means clear from the evidence that Mahan himself could at the time of his application transfer stock which was at the time pledged by him for a loan from another person, and it does not appear that the certificates were in his possession, or exhibited to the president or deceased at the time of the application to transfer, as required by the rules of the association, and by ordinary prudence in its officers. Neither is the evidence satisfactory that loss resulted from the call for stock. Indeed, ordinary experience would teach us that compliance with the call would have enhanced its value to that extent, and at all events that any loaner or pledger interested, or Mahan himself, might have paid the call if need be out of the loan. At all events, his contract with the company as a stockholder was to pay the amount of his stock as called for under the charter until fully paid up, and if injury or loss resulted from such call, it was "*damnum absque injuriæ*," and affords no basis for a claim for damages which are never recoverable for the mere enforcement of a legal right or obligation.

The Loan and Pledge Association would seem from the evidence to be a corporation of very questionable vitality, and affording its president and chief manager an opportunity to ply his avocation of manufacturer at Baton Rouge, away from its domicile and place of business in New Orleans, if, indeed, it has any at all. This opposition is based upon an attempt to alter the entries in and books of the company, as kept by the deceased, subsequent to his death, and with his widow and administratrix necessarily at great disadvantage. To do this reliance is had upon parol evidence of a very loose and unsatisfactory character, which, taken even for all its worth, leaves both facts and amounts in great uncertainty. The chief witness is Benton, the president of the association, who swears in general terms that the deceased must have



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Succession of Woods.

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made improper entries and charges against the company for money loaned and interest collected on account of the loans, when in point of fact he had not the means to make such loans. He does not pretend to have any knowledge of the particular acts or facts of these entries, which it seems were going on for a long time, and always open to the inspection of the president and directors. The former confesses that he had so much confidence in the deceased that he did not examine the books as he ought to have done. He, however, swears that Woods subsequently admitted to him that he had used moneys of the company for his own purposes, and promised to make it good, and gave a writing to that effect. If so, that writing was the best evidence. It has neither been produced nor legal steps taken to pave the way for the reception of evidence of its contents. It is not shown to have been destroyed, and, if lost, no proper efforts have been made to recover it. Under these circumstances the judge *a quo* very properly refused to receive or consider the evidence of its contents.

The same witness also swears that the deceased was entitled to only \$100 per month salary as bookkeeper, and that the credits on the books of larger amounts or at higher rates in his favor should be disallowed, or rather disregarded, and his succession made to account for these sums, also. It appears that \$100 per month was the salary due deceased as bookkeeper only. He was subsequently made cashier, also, and it is elsewhere shown by the same witness that the former cashier received \$2000 per annum, or, perhaps, \$1800. No resolution or action of the directory, nor any contract or understanding with the deceased that he should perform the duties of cashier for less than his predecessor, is shown. It was unreasonable to expect him to perform the additional duties of another office, and one so important, without additional compensation, also. It does not appear that the items in question were overcharges under the circumstances. As to the ability of the deceased to make the loans to the company upon the want of which, and not upon any *knowledge* to the contrary, the witness relies, it appears from his own testimony that the deceased owned a house which had cost him several thousand dollars, and which, as was not uncommon at that time, he may have used as a basis of credit to make the capital so invested active and interest-producing instead of dead or inactive, and that the witness himself bought from him stock to the amount of over \$2800, although he says that was raised to liquidate the indebtedness of deceased—to whom or for what purpose is not shown. The entries on the books charging the company with the loan correspond in date and amount with this transaction, and it is at least singular that they should have been made by the deceased with so much boldness, if in fact, as charged, he was a defaulter; or, at all events, that he should have

afforded by his own entries on the books of the company as to this and other matters so ready a means for his own detection. It also appears on the books, and is equally singular according to the theory of the opponent, that in less than a month afterward, in June, 1872, the deceased charged himself with \$1200 loaned money returned to him, and at different times with small sums of from twenty dollars to fifty dollars interest on loans paid him, thus multiplying the means of detection and evidence against himself, if there was no foundation for the entries. Another, and perfectly disinterested witness, Van Benthuyssen, also avers that he bought three lots from the deceased, and paid him \$6000 cash for them. So that, taking into account this sum, the \$2850, price of stock, and the amounts derived from current salary due monthly, and if not drawn properly chargeable against the company in favor of the deceased, and without reference to other means or sources from which moneys might have been derived, as shown by this record, the argument that the deceased did not make the loans to the company because he could not has no great weight, especially in view of the evidence of the same witness, Benton, that he himself made advances, but of his own means, in buying up stock for the benefit of the company, which does not seem to have been independent of aid from its own officers at times. There are other and minor items which it is unnecessary to discuss. The deceased seems to have been so implicitly trusted by the president, directors, and company while living that the offices of bookkeeper and cashier were combined in his person. The books, always open to inspection, were kept in a manner far from suspicious, and very unusual for one seeking to defraud. He is dead, and his voice and evidence sealed forever. That of the president, upon whose testimony the opponent relies almost entirely, even if given all the weight which can be claimed for it, fails to make opponent's case certain or satisfactory. The demand is waged against a succession on items originating, if at all, years since, and which do not appear to have been legally demanded during the life of decedent, and while the books kept by the deceased might not have been receivable at his instance or that of his administratrix in his own favor, they were offered as they appear with entries both of debit and credit by the opponent, who is, therefore, bound by them, unless they are satisfactorily contradicted, or shown by other evidence to be false. This has not been sufficiently done in a contest waged under these circumstances, and at this late day, after the death of the deceased, and based solely on parol evidence of the grossest violations of law and common honesty in one whose good character and standing for years while living is shown by the evidence of the opponents themselves. The district judge heard and saw the witnesses; he is intelligent and capable, and thought that the opponent's claim

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 Succession of Woods.
 

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should be rejected. The record before us does not warrant us in arriving at a different conclusion. Neither are we prepared to say that he erred in ordering stricken out or in refusing to consider the evidence in chief of a witness in the absence and by reason of the failure to produce at the same time the cross-examination of the same witness, or in refusing to receive or consider after the submission of the cause, on the evidence then on file, evidence sought to be filed subsequently—matters raised by two bills of exceptions taken by opponent.

The judgment below rejected the oppositions both of Chubbuck and of the Loan and Pledge Association. It was correct, and is affirmed.

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 ON APPLICATION FOR REHEARING.

MANNING, C. J. Rule IX of this Court requires that printed statements of the points and authorities, upon which the applicant for rehearing relies, shall be filed in support of his written or printed petition for a rehearing.

This rule has not been complied with, and therefore  
The rehearing is refused.

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 No. 7001.

## EDWARD J. GAY &amp; Co. vs. GILBERT A. DAIGRE ET AL.

The privilege acquired by one creditor on certain property gives him, or his transferee, no preference over another creditor who had previously acquired a mortgage on the property, unless the act, or other evidence of the privilege debt, was recorded on the day the debt was contracted.

Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account, is not recording the evidence of the debt on the day on which the contract for making the advances was entered into.

The pledge which the act No. 66, passed by the Legislature in 1874, gives to factors, and others, on certain property of planters, when they have made and recorded certain written contracts, will not operate to the prejudice of creditors holding pre-existing mortgages on the property, unless the contracts were recorded on the day they were entered into.

**A** PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *McVea, J.*

*Barrow & Pope* for plaintiffs and appellants.

*Saml. P. Greves* and *A. S. Herron & Bird* for defendants.

The opinion of the court was delivered by

MARR, J. The executors of John Bird recovered judgment against Gilbert A. Daigre for \$5000, with recognition of their mortgage rights and vendor's privilege on Mulberry Grove plantation, situate in the par-

ish of East Baton Rouge; and in another suit they recovered judgment against Daigre for \$20,331 85, with recognition of their mortgage rights on the same property.

The note on which the judgment for \$5000 was obtained was secured by a mortgage recorded in October, 1869. The judgment for \$20,331 85 was for the aggregate sum represented by four notes of different dates; one for \$5700, secured by mortgage recorded in March, 1870; two amounting to \$11,814 66, secured by mortgage recorded in June, 1870; and one for \$2817 19, secured by mortgage recorded in July, 1870.

On these two judgments executions issued on the twenty-second December, 1874, under which the sheriff seized and sold the plantation, with the appurtenances; and the executors purchased the whole for \$25,200, which the sheriff applied *pro rata* to the two writs, as shown by his return.

Before the day of sale Edward J. Gay & Co. intervened by way of third opposition, and claimed privilege and preference on a quantity of cane, part of it put up for seed, and part already planted for the crop of 1875, hay, cord wood, and five mules. They claimed a privilege on the mules for \$300, the balance of the price, as subrogees of the vendor; and a lien and privilege on the cane, hay, and cord wood, under an act of pledge in conformity to the act number sixty-six, of 1874.

The judgment of the district court, from which Gay & Co. appealed, was in favor of Bird's executors, and rejected the demand and opposition of Gay & Co.

The mules were purchased by Daigre, for the use of the plantation, on the tenth February, 1874; and he acknowledged, in writing, the balance of \$300 to be due. The claim was transferred to Gay & Co. by the vendors on the eleventh December; and the whole was recorded in East Baton Rouge on the twenty-second December. As the law was at that time, and continued to be up to the passage of the act number forty-five, of 1877, page fifty-nine, no privilege conferred a preference on the creditor who held it over a creditor who had acquired a mortgage, unless the act or other evidence of the debt was recorded on the day the contract was entered into. R. C. C. article 3274; State *ex rel.* Prager vs. Recorder of Mortgages, 28 A. 534; Succession of Marc, 29 A. 412.

Manifestly, the contract on which the vendor's lien and privilege rested was that between Daigre, the purchaser, and Payne, his vendor; and this lien should have been recorded on the day it was entered into, February 10, 1874. The vendor could have transferred to Gay & Co. no other right than he himself had, at the date of the transfer, December 11, 1874; and the recording on the twenty-second December was wholly without effect, so far as the mortgage creditors were concerned.

The law under which the right of pledge is claimed is entitled an act "to enable planters, farmers, merchants, traders, and others to pledge and pawn cotton, sugar, and other agricultural products to merchants, factors, and others, and to confer a pledge by the transmission of a bill of lading or carrier's receipt by mail or by the carrier." Under this act a contract of pledge and pawn was made between Gay & Co. and Daigre, on the third July, which was recorded on the seventh July, 1874. Gay & Co. also made up their account current, beginning with a balance of \$6851 56, on the thirty-first July, brought down to twenty-fourth November, with a balance of \$8869 23; and another account, beginning November 24, with this balance, and closing December 21, 1874, with balance, \$3382 29; in addition to which they claimed balance of \$19,874 59 on mortgage notes held by them. These accounts were recorded on the twenty-second December, 1874; and it is the balance, \$3382 29, for which they claim the lien and pledge.

The second and third sections of this act are but enlargements of the privilege of the consignee as established by the R. C. C. article 3247; and it is not necessary to consider them, as there was no shipment or consignment of the property in question.

The first section of the act provides that, in addition to the privilege now conferred by law, any planter, etc., may pledge or pawn his growing crop of cotton, sugar, or other agricultural products for advances in money, goods, and necessary supplies that he may require for the production of the same, by entering into a written agreement to pledge the same, and having the agreement recorded in the office of the recorder of mortgages of the parish where said cotton, etc., is produced, "which recorded contract shall give and confer on the merchant, etc., a right of pledge upon the said crop, the same as if the said crop had been in the possession of the pledgee."

The law which gives a privilege for necessary supplies, etc., furnished to any farm or plantation, "on the crops of the year and the proceeds thereof," is article 3217 of the R. C. C., embodying the act number 195, of 1867. Of course this privilege falls under the dominion of the constitution of 1863, article 123, which requires all privileges to be recorded in order to have effect against third parties, and of the R. C. C. article 3274, which required the act granting the privilege or other evidence of the debt to be recorded on the day that the contract was entered into in order to confer a preference over creditors who have acquired a mortgage. *Beard vs. Chappell*, 23 A. 694; *Bank of America vs. Fortier*, 27 A. 245; *Adams vs. Adams*, 27 A. 275. The recording on the twenty-second December could not have been on the day the contract between Gay & Co. and Daigre was entered into; and the recording of an account current for advances running through several months

on the day after the date of the closing of that account is not, in any sense, the recording of the evidence of the debt on the day the contract under which the advances were made was entered into. *Prager vs. Recorder of Mortgages*, 28 A. 535.

The right of Gay & Co. depends upon the agreement of July 3, 1874, recorded on the seventh July, not on the day the contract was entered into. The counsel for Gay & Co. contend that the contract was a pledge, and although the law requires it to be recorded, it does not prescribe the time at which it shall be recorded; and that it takes effect from the date of the recording. This may be true in general; but it is not true so far as creditors having pre-existing mortgages are concerned; and we think that, whenever the law requires a contract to be recorded, and is silent as to the time within which it must be recorded, its effect is limited and controlled by article 3274.

The lessor need not record the right of pledge by which the rent is secured to him, because the movables subject to his right are in his possession, that is, they are in his house, on his premises. The law does not require the consignee who has made advances on the goods consigned to him, or to whom a general balance is due for advances, to record his claim, because when the shipment is made, and the goods are in the possession of the carrier, the carrier is the agent of the consignee; his possession is the possession of the consignee; and the bill of lading or the carrier's receipt, when it has once passed beyond the control of the shipper, the consignor, by being deposited in the mail, or delivered to the carrier to be transmitted with the goods, vests the legal title, the right of possession and control, in the consignee for the purposes and subject to the terms and conditions of the consignment; and the holder of such a title to movable effects has no occasion to put upon record the evidence of his right and title.

It suffices to say, with respect to the privilege of the lessor and that of the consignee, that the law does not require them to be recorded. The act of 1874 distinguishes between the right of a merchant making advances to a planter under the contract authorized by the first section and that of the consignee to whom the goods have been dispatched. It requires, in express terms, that the agreement between the merchant and the planter shall be recorded, while it imposes no such condition on the consignee.

Pledge is the generic term; that form of pledge by which movables are put into the possession of the creditor as security for a debt is called a pawn; and where the property pledged is immovable the contract is called antichresis. R. C. C. 3133, 3134, 3135.

An essential requisite of the pawn is that the thing must be actually delivered to and must remain in the possession of the creditor, or of a

third person agreed on by the parties. R. C. C. 3162. The act of 1874 authorizes the pledge or pawn of a growing crop, which can not, until it is gathered, be delivered to the creditor. To supply the want of actual delivery, the act requires that the agreement shall be recorded in the office of the recorder of mortgages, in the parish in which the crop is produced. The act does not say when it shall be recorded; and, no doubt, it would be good against creditors acquiring rights and privileges after the recording. But article 3274 declares, in the broadest terms, that no privilege can confer a preference over creditors having acquired a mortgage, unless it be recorded as prescribed by that article. It would require the positive declaration of legislative will to that effect to withdraw the contract authorized by the act of 1874, section one, or any other form of contract creating a privilege which the law requires to be recorded, from the control of article 3274, which is the general law applicable to every species of privilege.

If the right of the lessor and of the consignee need not be recorded, it is not because they are pledges; but because the law-making power has not seen fit to impose upon them the condition of recording which the act of 1874, section one, requires of the creditor for advances to a farmer or planter.

The counsel for Gay & Co. argue that, by the certificate of the recorder of mortgages, it appears that the mortgage debt of Bird's executors, with interest up to the date of the sale, amounted only to \$17,872 28; and, as the price of the adjudication was \$25,200, there remains a sum sufficient to pay the debt of Gay & Co., \$3382 29, with interest. The certificate was that which was annexed to the sheriff's return; and, as copied in the transcript, it omits the mortgage for \$11,814 66, recorded in June, 1870, as stated at the beginning of this opinion. The solemn judgment of the court recognizing this and the other mortgages, all of which appear in the record, with the certificate of the recorder of mortgages on each of them, showing the dates at which they were respectively recorded, can not be affected by the accidental omission in the certificate of the recorder of mortgages, prepared for the sheriff, and which was offered in evidence only incidentally, as part of the sheriff's return. This omission may have been the fault of the recorder, or of the copyist who prepared the transcript; but with the other evidence in the record, showing the precise amount of the mortgage debt and the dates of recording, it is wholly immaterial.

Edward J. Gay & Co. were not entitled to any right or privilege on the mules, or the cane, or the hay, or the cord wood, in preference to the mortgage creditors; and the district judge did not err in rejecting their demand and opposition.

The judgment appealed from is therefore affirmed with costs.

No. 7050.

JULIA A. VENTRESS, EXECUTRIX, vs. ISAAC D. BROWN ET AL.

The objection that a part of the immovables of a succession sold for less than their appraised value, and hence that its sale was null, is not an objection which the notary, before whom a judicial partition of the succession property is pending, could be required to refer to the court, before completing the partition. Such an objection can only be properly urged by way of opposition to the homologation of the partition.

The immovable property of a succession, even though partly owned by minors, may be sold for less than its appraised value, to effect a partition among co-heirs, or co-proprietors.

Where, in a partition suit, the act of the lower judge complained of was done on his own motion, and neither he, nor the parties interested in the partition, are before this court, the appeal will be dismissed.

**A** PPEAL from the Parish Court of Iberville. *Crowell, J.*

*Barrow & Pope* for plaintiff and appellant.

*A. & E. B. Talbot* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the twelfth of December 1876, the probate Court of the parish of Iberville ordered a judicial partition of the property belonging to the successions of James N. and Esther D. Brown, between the parties therein interested. The partition was referred to Adonis Petit—a notary public—who, on the 3d of December 1877, after notice to said parties, was proceeding to complete the same, when Isaac D. Brown, who is entitled to a share in said successions, submitted in writing to the notary his objection to the partition which was then about to be closed, and that objection is that lands situated in the parishes of Iberville and East Baton Rouge and which formed a part of the estates of James N. and Esther D. Brown, were sold for debts and adjudicated at less than their appraised value.

The said Isaac D. Brown urged that—on that account—said sales are null, that the lands thus adjudicated should be re-sold, and the partition suspended until this be done. The notary refused to suspend his proceedings and refer that objection to the Court. He was enjoined and commanded so to do by an order from the parish judge.

Mrs. Julia A. Ventress then interfered, and claimed—in her individual capacity and as dative testamentary executrix—that the notary should disobey the injunction to discontinue the partition, for the reason:

1. That the objection urged was frivolous and had been granted *ex-parte*, at chambers, without affidavit or bond.
2. That—when the order of injunction was served—the partition,



though not signed, was complete, and—at that stage—its homologation alone could have been properly opposed.

The notary closed the *procès verbal* of his proceedings and filed it in the parish Court. The judge, considering that it had been filed in contempt of his injunction, ordered that it be, and it was—accordingly—returned to the notary.

This done, the counsel for Mrs. Ventress attempted to file a motion to homologate the partition, the *procès verbal* of which was—under a previous order of the Court—to be returned to the notary. His application was denied, and Mrs. Ventress excepted to the ruling on this point.

The objection made by the counsel representing Isaac D. Brown, that lands of the herein mentioned successions were sold under their appraised value, is not one of those which he could have required the notary to refer to the court, for the reason that the court could not have passed upon the reference, and maintain or annul the purchasers' titles in a proceeding, the sole object of which was and still is to effect a partition among co-heirs. The notary properly disregarded that objection.

11 L. 497; 4 A. 8.

The notary appointed to make a partition is the ministerial officer of the Court by which the partition was ordered, and his duty is to execute the decree under which he is called upon to act, in accordance with its terms. If he fails to do so, any interested party may protest against his action, and—in such a case—the notary must suspend his operations and refer the matter to the judge, for his decision thereon. As to other errors and irregularities, they should be urged by way of opposition to the homologation of the partition.

R. C. C. 1348-1368; 12 R. R. 417; 13 A. 359; Gilbert, Codes Annotés, p. 346.

The lands which Isaac D. Brown alleges to have been sold for less than their appraised value were sold under a judgment of the parish court, of the 12th of December 1876, ordering the partition—by licitation—of the successions of James N. and Esther D. Brown; and this court has held again and again that lands, though partly belonging to minors, may be sold for less than their appraised value, to effect a partition among co-heirs and co-proprietors.

12 M. 185; 7 L. 8 L. 179.

From the recitals and the divers clauses of the act of partition, Isaac D. Brown's objection was made at the close of the notary's operation, when the active and passive masses had already been established, and the balances due by and to the heirs ascertained and fixed. The notary had, then, but to sign himself, tender to the interested parties for their approbation or disapprobation, the *procès verbal* of his operations

and return it into Court. This he did, and the application of Julia A. Ventress to have the partition homologated, after the delay and formalities prescribed by law, should have been received and passed upon.

We are informed, by the bill of exception taken by her counsel, that it was the judge who—of his own motion—ordered the *procès verbal* to be returned to the notary and rejected the application made in appellant's name, and—as neither the judge, nor the parties interested in the partition are before us—

It is ordered that this appeal be and it is dismissed at the costs of Julia A. Ventress.

### No. 7156.

STATE EX REL. KRAMER, WIDOW, ETC., VS. JUDGE SIXTH DISTRICT COURT ET AL.

In the rule *nisi* granted by this court on an application for a writ of prohibition, the answer of the defendant should be sworn to.

After the bond required by the lower court has been given, and filed, that court has no farther jurisdiction of the case, except to pass upon the solvency and sufficiency of the sureties on the appeal bond. The lower court can not set aside a suspensive appeal, or make it a devolutive one, on the ground that the amount of the bond (fixed by itself in a case where the court is required to fix it) is not the correct amount.

**A**PPPLICATION for a writ of prohibition.

*John & C. B. Ray and L. Charvet* for relator.

*A. J. Lewis* for respondent.

The opinion of the court was delivered by

MARR, J. Bernard Seir, by his will, gave to his wife, Catherine Kramer, the usufruct of his entire succession; and he left a daughter Josephine, wife of Joseph Snow, who was his forced heir. The will was probated; and by judgment of the Second District Court of date May 4, 1876, Mrs. Seir was recognized as the usufructuary, and her daughter Josephine was recognized as sole forced heir of her deceased father: and it was ordered that the usufructuary and the daughter, sole heir, “in their respective capacities, be put in possession of all the property, real, personal, or mixed, left by said deceased.”

In October, 1877, Mrs. Josephine Snow, aided and assisted by her husband, brought suit in the Sixth District against her mother, to have the usufruct declared to be extinguished, for various causes. The proceeding is novel.

On March 16, 1878, final judgment was signed, the reasons for which were orally assigned, decreeing the “absolute extinction of the right of usufruct bequeathed to Catherine Kramer, widow, by her deceased husband, Bernard Seir.” She moved for a suspensive appeal, on the same

day, in open court, and it was granted, returnable in this court on the first Monday of April, on her giving bond in the sum of \$500. The bond was given and filed on the 25th March. On the 16th March, the day on which the judgment was signed and the appeal granted, nine days before the appeal bond was dated and filed, plaintiff's counsel took a rule on the defendant, appellant, to show cause why the appeal should not be dismissed, and execution issue, on the grounds :

1. That the surety in the bond is not good and solvent, nor such as is required by law ;
2. That the amount of said bond is insufficient and entirely inadequate to the protection of plaintiff's interest.

One would naturally suppose that the taking of this rule on the first ground would not have preceded the giving of the bond ; but the original motion is before us, and it was actually filed on the 16th March, as the copy from the minutes in the transcript shows.

The rule was tried and submitted on the 28th March ; and on the 12th April it was made absolute : the appeal, so far as it was made suspensive, was dismissed ; and it was ordered that execution issue to enforce the judgment.

Meantime, on the 4th April, Mrs. Kramer's appeal was perfected by the filing of the transcript in this court. Subsequently she applied for a writ of prohibition, forbidding the judge and the plaintiffs, Josephine Snow and her husband, Joseph Snow, to proceed further in the cause. The usual rule *nisi* was granted ; and an answer, which begins with a general denial, was filed. This answer purports to be that of Josephine and Joseph Snow. It is signed by their attorney, and also by the judge ; but it is not sworn to by any one. We think it should have been sworn to : this has been the practice ; and it is in every respect proper.

The party applying for a writ of prohibition makes out such a state of case, by the allegations of his petition, as, *prima facie*, entitles him to the writ, and the object of the rule *nisi* is to enable the judge and the persons against whom the writ is prayed for to be heard, and to show any facts, not stated by the relator, which may tend to destroy the *prima facie* case made by the petition. This rule does not admit of exceptions, nor of the general denial : it simply requires a statement of such facts, appearing of record, or reference to such rules of law as, in the estimation of the respondent, authorize the acts complained of.

The judgment making the rule absolute, and ordering execution, does not inform us whether the judge decided that the sureties were pecuniarily insufficient, or that the amount of the bond was not sufficient. If he held that the sureties were not pecuniarily sufficient, we do not agree with him. There were two sureties, both owners of real estate, one of them a man of large means, either of them amply sufficient. If

he decided that the amount was not sufficient, the error in fixing that amount was his ; and the utmost that he could have done, if he had that power, after the bond was signed and filed, would have been to have allowed a rule on appellant to show cause why bond should not be given for a larger amount. But we think, when the bond was once given and filed, the District Court had no further jurisdiction or control of the case, except to inquire into and to pass upon the solvency and sufficiency of the sureties on the appeal bond. If the judge erred in fixing the amount of the bond, his order might have been reviewed by this court ; we think it was not competent for him to do so.

The judgment appealed from did not decree the payment of any sum of money ; and it did not decree the delivery of any movable or immovable property. It simply decreed the extinction of the right of usufruct.

The answer states that the value of the real property subject to the usufruct was \$6300 : that the revenues for three years, during which the appeal would probably be pending in this court, would be \$2592 ; and that a bond for \$10,188 would be necessary to protect the plaintiffs.

As the judgment is not one falling within the terms either of article 575 or 576 or 577 of the Code of Practice, the judge was bound, in granting the appeal, to fix the amount under the provisions of articles 573, 574. Having done this, and the bond having been given and filed, the judge had no power to dismiss the appeal, nor to make it devolutive instead of suspensive.

If the bond should have been for a larger amount, it would be highly unjust to deprive the appellant of the benefits of a suspensive appeal for no other fault than a strict compliance with the terms and conditions on which the order of appeal had been granted. In this case the judge decided that the bond was not sufficient, on the 12th April, nearly a month after the judgment appealed from was signed ; and when the right of suspensive appeal no longer existed. If the objection had been passed upon within the delay fixed for a suspensive appeal, *non constat* that appellant would not have been able to have given such bond as might have accorded with the changed views of the judge. His attention was called to the amount of the bond on the 16th March, the day on which he had fixed the amount ; and it was too late for him, after the bond had been given and filed, after the delay for a suspensive appeal had expired, to impose upon the appellant new conditions, or to dismiss the suspensive appeal.

It is therefore ordered, adjudged, and decreed that the rule *nisi* herein granted be made absolute : that the prohibition as prayed for be made peremptory ; and that respondents pay the costs of this proceeding.

## Succession of Foucher.

No. 7155.

## SUCCESSION OF WIDOW L. F. FOUCHER, MARQUISE DE CIRCÉ.

When by the will of a foreign testator property is devised to minors, in this State, under the tutorship of their surviving fathers or mothers, it will fall under the administration of the tutors, or tutrices. Any clause in the will requiring judicial appointment of special administrators to take charge of the property, during the minority of the legatees, will be considered as not having been written.

A devise, by which property left to a minor is put in the possession and under the control of a third person until the majority of the minor, involves a *fidei commissum*, which is prohibited by our law.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*Henry Denis* and *Henry Chiapella* for dative testamentary executor and appellant.

*E. Bermudez* for Widow G. Burthe, tutrix and appellee.

*Victor Olivier* for Widow E. Burthe, tutrix and appellee.

*R. T. Beauregard* for Widow L. Burthe, tutrix and appellee.

The opinion of the court was delivered by

**MARR, J.** Widow Foucher, Marquise de Circé, died at Paris, leaving a last will, duly probated, by which she instituted as her universal legatees, "conjintly," the children of her four brothers deceased, and in default of children their descendants, in equal portions, in each branch.

"Entendant, ainsi, leur donner tous biens, meubles et immeubles, qui dépendent de ma succession, tant en France, que dans tous autres pays, et notamment en Louisiane."

The clause of the will which occasions this controversy is as follows:

"Voulant sauve-garder, autant qu'il peut dépendre de moi, les intérêts de tous mineurs privés de leur père, qui seraient appelés à recueillir une part de ma succession, je veux qu'il leur soit nommé par justice un administrateur spécial, sans lequel, jusqu'à leur majorité, il ne pourra être procédé à aucun réglemant ni partage de ma succession, et qui aura seul droit de toucher et retirer tous objets valeurs et capitaux, comme tous revenus appartenant aux dits mineurs."

Mrs. Widow George Burthe, natural tutrix of her minor children, alleged to be heirs of one eleventh, under this will, took a rule on Arthur Denis, dative executor, to show cause why he should not proceed to a distribution of the large sum of money deposited in bank and susceptible of immediate distribution.

A few days after this rule was taken, the dative testamentary executor, Arthur Denis, took a rule on Widow André Burthe, Widow Emmanuel Burthe, and Widow George Burthe, natural tutrices respectively

30	1017
45	997
30	1017
48	164
48	173
48	180
49	1177

of their minor children, to show cause why the court should not proceed to appoint a special administrator to these minors, as required by the will.

The defendants in this rule plead that the clause of the will in question is void, and should be considered as not written :

FIRST.—Because, by the laws of this State, the tutor is alone and exclusively entitled to administer the property belonging to his ward, to receive all moneys or revenues accruing to him, and to represent him in all legal proceedings ; and that respondents, as the natural tutrices of their minor children, can not be deprived of the administration of their property by the appointment of any special administrators, who are officers unknown to our laws ;

SECOND.—Because the said disposition creates a trust or *fidei commissum*, which is reprobated by the laws of Louisiana.

They pray the court to decree the nullity of the disposition directing the appointment of special administrators, and, furthermore, to decree that respondents are fully entitled and authorized to represent their minor children, in all the proceedings pertaining to the settlement of this estate, as if said clause had not been written by the testatrix.

On the trial it was agreed that the only issues between the parties were : 1. Whether a special administrator can legally be appointed to the minor legatees ; 2. In case the court decides that this can not be done, whether the dative executor may, legally, under the provisions of the will, make settlement with and distribution to the universal legatees before the majority of the minor legatees.

The court made absolute the rule of Widow George Burthe, and decreed that the executor proceed, at once, to the distribution of the sum of money in his hands, according to law ; and that the rule of the executor to appoint a special administrator to the minor heirs be dismissed.

The copy of the will in the transcript contains no appointment of executor ; and from its terms it seems that the testatrix did not contemplate any administration of her succession in Louisiana. The instituted heirs were the children and descendants of her four brothers deceased ; and her intention seems to have been that a special administrator should be appointed to the fatherless minors ; and that the major heirs and the administrator would settle and make partition of her succession, the portions coming to the minor heirs to be controlled and administered by the administrator.

In France, where this will was written, the law permits the testator to appoint an administrator to minor beneficiaries of the will, only where, by the death of either father or mother, they are under tutelage. So long as father and mother live the father administers the estates of

their minor children ; but when, by the death of either, the minors are under tutelage, the testator may appoint an administrator of the property bequeathed by him to the minors ; and thus deprive the tutor, whether surviving father or mother, or some other person, of the administration which otherwise would belong to him in virtue of his office. *Marcadé*, 2, 160, No. 152.

There is but little difference in the provisions of the Code Napoleon and of our Code in respect to minors and their tutorship; and we should be inclined to follow the French jurisprudence and commentators in a case in which our own Code or jurisprudence is silent. Article 250 of the R. C. C. declares that the tutorship of minor children belongs of right to the surviving father or mother.

The mother may refuse to accept the tutorship ; but in that event she would retain the superintendence of the children, and the care of their education ; and the tutor would be intrusted merely with the administration of their property. R. C. C. 253.

The tutor administers the estate of the minor : he has the care of his person ; and represents him in all civil acts. R. C. C. arts. 336-337.

The mother may refuse the tutorship, or she may forfeit it by second marriage, without having obtained the consent of the family meeting that she shall retain it ; and the father may be excluded or removed from the tutorship for the causes specified in the Code. But where, for any cause the surviving father or mother is excluded or removed, the law provides for the appointment of a tutor ; and it is always the tutor, and no other than the tutor, who administers the estate of the minor, and represents him in all civil acts.

Our law knows nothing of a special administrator for the minor ; and the duties of such an administrator would clash with those imposed by law upon the tutor. The testatrix did not name a special administrator ; but she required one to be appointed judicially. Her will in this respect conflicts with the plain text of the law of Louisiana. The judges having probate jurisdiction have no power to give the custody of the minor or the administration of his estate to any other than his tutor. It is only the surviving father or mother who can by will or public declaration before a notary appoint a tutor ; and if the court should attempt in obedience to the will of the testatrix to appoint an administrator, that administrator would be clothed with all the powers of the tutor with respect to the estates of the minors, during their minority ; that is, he would be intrusted with part of the functions of a tutor, while the real tutor would be charged with the remainder of the duties and functions of that office. Perhaps the testatrix was advised that the law of Louisiana, which is like that of France in this respect, would not permit her to appoint a testamentary tutor ; and that the estates of

minors must be administered under the control and supervision of the Court of Probates. Be this as it may, our law gives no power or authority to the Probate Court to appoint any other administrator of the estates of minors than the tutor, who becomes an officer of the court, and is subject to the orders and control of the court in his administration. If the father or mother be living and competent, the court can not refuse to recognize and confirm such father or mother as natural tutor or tutrix, because the tutorship devolves upon them of right; and the court has no power to separate the administration of the property, to deprive the tutor of it, and to intrust it to a special administrator, or any other person or officer whomsoever.

In *Clague vs. Clague*, 13 La., 1, the will required the executors to continue their administration until the majority of the children, heirs of the testator, and to retain the funds of the estate until that period, for their benefit. The widow, natural tutrix, demanded to be put in possession, and called upon the executors to account and pay over to her whatever balance might remain in their hands. This court decided that the disposition requiring the executors to retain the property in their hands until the majority of the heirs was a *fidei commissum*, and was forbidden by the Civil Code, article 1507, R. C. C. 1520. See, also, *Hoggatt's case*, 10 A. 169.

It is obvious that the testatrix, in this case, when she used the terms "*réglement et partition de ma succession*," had in view only the separation of the portions falling to the major heirs from those of the minors; and that her intention was that the special administrator should retain the custody of the portions of the minors, and administer during their minority. This was a trust; and it does not differ, in any respect, from the disposition in *Clague's* will, except that the persons charged with the trust in *Clague's* will were the testamentary executors; while in this will the person so charged is the special administrator. That the testatrix intended that he should retain in his hands and administer the entire portions falling to the minors, is manifest from the whole context, and is placed beyond question by the last clause:

"Les revenus de la part de chaque mineur serviront à son éducation et à ses besoins personnels."

It will be observed that the Code Napoleon, article 896, which corresponds in all other respects with articles 1507 of the C. C., 1520 of the R. C. C., prohibits substitutions only, while our Code prohibits *fidei commissum*, also. If, as this court decided in *Clague's* case, the charge imposed upon the executors was a *fidei commissum*, the fact that *fidei commissum* are not forbidden by the law of France, when they are not also substitutions, enables us to understand why it is that under the law of France a testator may deprive the tutor of the administration of



## Succession of Foucher.

property bequeathed to a minor during his minority, while such a disposition would not be tolerated under our law.

We incline to the opinion that the clause in the will of the Marquise de Circé in question falls within the prohibition of article 1520 of the R. C. C.; but, whether this be true or not, the condition that a special administrator shall be appointed for the minor heirs is illegal, and, in that sense, impossible, and it is to be considered as not having been written; that is, as not forming any part of the will. The legal title to all that the testatrix owned passed to and was invested in the universal legatees, and it must be administered in accordance with the law of Louisiana; that is, those portions which fall to the minors must be delivered to the only legal representatives recognized by our law, their mothers, natural tutrices, having the custody of their persons and the care of their education, and charged by law with the administration of their estates.

The judgment appealed from is affirmed with costs.

No. 6947.

SARA T. BOWMAN VS. KAUFMAN, SHERIFF, ET AL.

When the plaintiff in injunction appeals, by motion in open court, from the judgment dissolving the injunction and condemning him and the surety on his bond in damages *in solido*, the surety thereby becomes a party, appellee, and hence is disqualified from becoming the plaintiff's surety on his appeal bond.

An appeal taken separately by one of two defendants who have been condemned *in solido*, will not prevent the other from taking an appeal at a subsequent time, within the legal delay.

A married woman may enjoin the execution of a judgment against her, when the ground of the judgment was a debt of her husband, even though she failed to set up that defense in the suit in which the judgment was obtained.

The failure on the part of a wife to prosecute an appeal she had taken from a judgment against her on account of her husband's debt, will not estop her from subsequently contesting the legality of the judgment.

A married woman, even though separate in property, can not be held liable for a debt contracted by her husband, unless it be affirmatively shown that it inured to her separate benefit.

As between appellees, the judgment of the lower court will not be disturbed.

**A**PPEAL from the Seventh Judicial District Court, parish of West Feliciana. Yoist, J.

Sam J. Powell for plaintiff and appellant.

W. W. Leake for defendants and appellers.

ON MOTION TO DISMISS.

MANNING, C. J. The appellees move to dismiss on the grounds, that there is not a legal bond of appeal—that the surety on the injunc-

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tion bond is incompetent as a surety on the appeal bond, having been condemned as a party to pay damages—and that the order for one of the appeals is void, because rendered after the jurisdiction of this court had attached.

The plaintiff had obtained an injunction upon a bond with surety, conditioned in the usual form. The injunction was dissolved, and judgment was rendered for fifty dollars as damages against the plaintiff and her surety *in solido*. She moved for a suspensive appeal in open court, and perfected it by giving bond with the same person as surety. In the following month, the surety prayed an appeal by petition, and gave another person as her surety.

In an early case it was held, that the conditions of the two bonds being different, the original one being only for damages consequent on a wrongful suing out of the injunction, and the last, that the surety will pay the judgment to be rendered on the appeal, the same person may well sign both, if otherwise unexceptionable, unless he has been condemned as a party by the judgment appealed from under the act of 1831. *Leeds v. Yeatman*, 12 La. 383. That act is now incorporated in the Revised Statutes of 1870 as sec. 1754. The defendants insist that the solidary condemnation of the plaintiff and her surety on the injunction bond to pay the damages, as provided by the act of 1831, places this case pointedly within the exception mentioned in that decision.

The plaintiff cites *Greiner v. Prendergrast*, 2 Rob. 235 as conclusive authority for the contrary doctrine. In that case, upon a dissolution of the injunction, the plaintiff and his surety were condemned *in solido* to pay twenty-seven dollars as damages, with ten per centum interest on the amount of the enjoined judgment. The plaintiff prayed a suspensive appeal, and gave bond with the same surety. The same objection was made then as now, and the court held that a party had a right to a suspensive appeal, provided he offered such surety as would indemnify his adversary against all consequences which might result from the appeal. It is true, say the court, that if both the principal and surety, against whom damages had been given on the dissolution of the injunction, had joined in an appeal, they would have been bound to give one solvent surety, although they were both admitted to be sufficiently solvent to remove all idea of danger on that score. The reason would be that the law expressly requires surety on the grant of any appeal.

It will be observed that case is identical with the present one, and the two Justices who were the organs of the Court in the two cases cited were both on the Bench together when each of them was decided. The last must then be considered as overruling the first, if indeed it is not reconcilable with it. The expression, unless the surety has been

condemned as a party, may be understood as another way of stating the reason of the rule why he could not then be taken as a surety, viz that he would then be a principal and must himself furnish a surety.

But since those decisions were made, important and radical alterations have been made in the laws governing appeals. Now, when an appeal has been taken by motion in open court, all parties who are not appellants are declared appellees, and the bond in favor of the clerk is for the benefit of each and every one of the appellees, and may be sued on accordingly.

When the plaintiff took her appeal in open court, and filed her bond, the surety, who had been condemned with her solidarily for damages, became *eo instanti* a party to the appeal, as appellee. When that surety then became again a surety on the appeal bond, he occupied the double and inconsistent positions of an appellee, whose interest was a maintenance of the judgment, and a security to pay the judgment on appeal, in case the appellant did not pay.

Under these changes in the laws governing appeals, and because of them, we hold that in all cases where a party is necessarily appellee if he be not appellant, the surety on an injunction bond is incompetent to be a surety on a bond for an appeal from the judgment dissolving the injunction, and for damages against principal and surety *in solido*. And it was so held by us at the last term. *Dumas v. Mary*, Opinion Book, 47 p. 265. The appeal of the plaintiff is therefore dismissed.

But that of the surety is good. That appeal was taken by petition, and a separate security given. The filing a bond of appeal by one of the parties condemned in the judgment below lodged only her appeal in this court, and did not prevent the other from taking an appeal at a different time within the permitted delay.

The motion to dismiss the appeal of plaintiff is allowed. The motion to dismiss the appeal of the surety is denied.

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#### ON THE MERITS.

The opinion of the court was delivered by

MANNING, C. J. This suit is to have decreed the nullity of a judgment, obtained by J. F. Irvine against the plaintiff, and to restrain its enforcement by *feri facias*, to accomplish which an injunction was obtained. The plaintiff is married, is separate in property from her husband, and alleges as causes of nullity that the debt, for which the judgment was rendered, was solely a debt of her husband, and that it was rendered without service of citation upon her.

The answer pleads the general issue, and discloses the want of interest of Irvine in the judgment because of its transfer through another

party to Flash, Lewis & Co. its present owners, who intervene and defend.

It is excepted by the intervenors that Mrs. Bowman can not now injoin the collection of a judgment for matters which she could have opposed to the demand in the original suit, a general proposition, the soundness of which is incontestable. It is however subject to some modification, as in the cases where the party sued was under an incapacity to contract. Hence a judgment against a married woman upon two notes, executed by her husband, and by herself as his surety, was held open to assault by means of an injunction, although she had failed to make that defence to the suit upon them, because the judgment, *quoad* the wife, was null, being upon obligations *in fraudem legis*, which she was incapacitated to make. *Medart v. Fasnatch*, 15 Annual, 651. And that principle has been carried so far that the wife is permitted to sue to annul, and to injoin the enforcement of a judgment which she had confessed. *Baines v. Burbridge*, *Idem*, 628.

It was also objected that Mrs. Bowman appealed the original judgment, and failed to prosecute her appeal, and therefore she is now estopped from contesting its legality. But if she can contest the legality of a judgment she has solemnly confessed, how much more can she contest one which she disputed, and particularly when the failure to prosecute the appeal was owing to marital influence. *Bisland v. Provosty*, 14 Annual, 169. She testifies that she signed the appeal bond for the purpose of prosecuting her appeal, and never instructed her attorney to desist.

The proof is very complete that the debt was the husband's. Irvine was a factor in New Orleans, and kept his account for advances and supplies, against the husband, or 'in his name as a courtesy,' as he says, and this account was the basis of the judgment. It does not matter what words or name were written at the heading of the factor's books, so far as fixing liability goes. He could not make her liable by merely keeping the account against her, and she could not avoid liability, if it was kept in the husband's name, if in fact she was legally chargeable.

But it is manifest that Mrs. Bowman was not thought of until it was apparent that a suit was looming in the near future. The account was opened in 1869 against the husband and was continuous to 1874, with such charges as payments of 'your draft,' the draft being the husband's, and statements of account, invoices, etc. were made to him alone. The bookkeeper says;—the whole account was kept and made out in the name of Mr. Bowman, and the items, 'by your draft,' mean the draft of Mr. B. The account was afterwards changed to the name of Mrs. Bowman, after the transactions were closed, with the view of bringing the

suit as he supposed. The change was made just previous to bringing the suit, by order of Mr. Irvine.

Nothing is better settled than that the debt must be shewn affirmatively to have enured to her benefit, when a party is seeking to enforce it against a wife, and she alleges that it is her husband's debt alone, and the fact that she is separated in property from him does not change the nature of the proof required, nor shift the burthen of proof from him who seeks to make her liable upon her who is attempting to escape liability. *Erwin v. McCalop*, 5 Annual, 173. *Lee v. Cameron*, 14 Annual, 700. Even if the wife executes a mortgage under the authorization of the judge, the authority being for a specified sum and an expressed purpose, and the mortgage is for a different sum, and for the purpose expressed but also for an additional and previously unexpressed purpose, any one seeking to enforce the mortgage upon the wife's separate property must prove *aliunde* that the debt, secured by the mortgage, has enured to the wife's separate benefit, even though the debt is evidenced by a negotiable note, and its holder is the party enforcing its payment. *Conrad v. Leblanc*, 29 Annual, 123.

The proof not only fails to fix liability on Mrs. Bowman, but she establishes by affirmative testimony that the debt was her husband's, and that no part of it enured to her separate benefit, or the benefit of her separate estate. The suit is only one more instance, of which the Reports furnish many, where parties, having goods to sell or money to lend, and seeing a fair chance of profit, deliver their merchandize or send their funds with unsuspecting confidence to a man who has nothing with which to satisfy a judgment, but whose wife is mistress of the household treasury, and delude themselves with the fallacious hope that she will requite their complaisance by taking care that no harm comes to them.

There is not, and there never has been, any doubt about the law governing a married woman's liability. The courts have never wavered in applying it, and if parties will persist in ignoring what has been long settled through repeated adjudications, they must bear with equanimity the losses, the risk of which was incurred through rashness.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiff do now have judgment perpetuating her injunction, and for the costs of both courts.

DEBLANC, J. I concur in the foregoing decree.

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ON APPLICATION FOR REHEARING.

SPENCER, J. As stated in our previous opinions in this case, Sarah T. Bowman enjoined the execution of a judgment against her. There

was judgment against her, dissolving the injunction with damages against her and the surety on her bond *in solido*. Mrs. Bowman appealed by motion in open court. Her surety appealed by petition and citation. On motion we dismissed Mrs. Bowman's appeal, but maintained that of the surety, so that Mrs. Bowman is no longer before us as appellant, since her appeal has been dismissed. She appears only, then, as appellee in the surety's appeal. As between her, therefore, and the other appellees, we can not correct the judgment. See 15 A. 438; C. P. 890; 28 A. 99, 455. Our decree, therefore, so far as it annuls and reverses the judgment of the lower court as to Mrs. Bowman, is erroneous, and must be limited in its effects to the *surety only*.

The rehearing is granted.

#### ON REHEARING.

We are satisfied, upon re-examination, with our conclusions upon the facts of this case. The debt was, we think, one for which the wife was not liable, and could not bind herself, being that of the husband. The surety has the right by appeal to relief from the effects of an erroneous judgment.

It is therefore ordered, adjudged, and decreed that the judgment heretofore rendered by this court be set aside and annulled; and it is now ordered, adjudged, and decreed that the judgment appealed from, in so far as it affects or condemns Mrs. Mathers, the surety on plaintiff's injunction bond, be annulled, avoided, and reversed, and that she recover of appellees the costs of this appeal.

The said judgment appealed from, so far as the same affects the plaintiff, Mrs. Bowman, is not before us, and is not passed upon.

No. 7114.

#### STATE EX REL. LOUISIANA BOARD OF TRUSTEES FOR THE BLIND VS. THE JUDGE OF THE SIXTH DISTRICT COURT.

Except in cases of attachment, where the law fixes the fee of a curator *ad hoc*, the court can not, *ex-parte*, assess and order to be paid the fees of such an officer. A suspensive appeal in a case prevents, pending the appeal, any proceeding, contradictory taken, for fixing the fees due to a curator *ad hoc*.

**A**PPPLICATION for a writ of prohibition.

*Merrick, Race & Foster and Jno. A. Campbell* for relators.  
*Thos. Hinton and Richardson & Magruder* for respondent.

The opinion of the court was delivered by

SPENCER, J. The present relator brought suit in the Sixth District

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State ex rel. Board of Trustees for the Blind vs. Judge of Sixth District Court.

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Court praying an injunction against V. J. Dupuy *et al.*, causing curators *ad hoc* to be appointed for several of the defendants therein.

There was final judgment dismissing plaintiff's demand and refusing the injunction. Plaintiff took a suspensive appeal to this court.

After the appeal had been so taken and perfected, the court *a qua* on motion, *ex-parte* and without notice to plaintiff, rendered an order taxing or decreeing the payment of fees to said curators, as follows: To Richardson & Magruder \$250; to E. E. Moise \$150, and A. L. Tucker \$100. Relator, alleging that said court has no jurisdiction or power to render said *ex-parte* decrees, after appeal, and averring that said decrees will be executed, prays for a prohibition.

The judge *a quo*, in answer to the writ, admits the facts, but denies that he has exceeded his jurisdiction. He contends that relator as plaintiff is primarily liable for all legal costs, and that the appeal does not suspend the right of the officers of court to enforce them. That the allowances to the curators were part of the taxed costs accrued before relator's appeal, and the amount thereof peculiarly within his discretion. That if aggrieved, relator should have moved to rescind or made opposition.

The questions for us to decide are—

First—Whether in suits other than by attachment (when the law fixes a fee of \$10 for the curator without proof) the allowances of fees or compensation to curators *ad hoc* can be properly classed as costs that may be taxed *ex-parte* and on motion without notice. It is, we think, clear that the payment of such costs as may be so taxed is not suspended by plaintiff's appeal. He is bound to pay them whenever due, and their payment may be enforced notwithstanding his appeal from the judgment in the cause. The taxing of these costs is a mere matter of calculation, and is not in fact a "further proceeding" in the cause, within the meaning and intendment of article 575 C. P.; 10 R. 150. But we think that outside of the case of attachment, where the law fixes or taxes a fee of ten dollars without proof, the court can not, by *ex-parte* order and without notice, order the payment of specific sums to curators *ad hoc* as fees or compensation.

Unless the law itself fixes the amount of a fee, it can only be fixed contradictorily with the parties in interest. Any other rule would be intolerable, and violative of elementary principles. 13 An. 150.

Second—Holding, therefore, that the fees of curators in cases like the present must be adjudicated and fixed in a proceeding contradictorily taken, the next question is, does the appeal prevent such proceeding being had after it is taken?

We think the answer to this question is found in article 575 of the Code of Practice, which declares that the suspensive appeal "shall stay

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State ex rel. Board of Trustees for the Blind vs. Judge of Sixth District Court.

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*execution and all further proceedings until a definitive judgment be rendered on the appeal."*

"As soon as the appeal is perfected the court of the first instance can take no further steps in the case, except such as may be necessary to transmit the record to the Supreme Court." 10 R. 419.

It is therefore ordered that the writ of prohibition heretofore issued be made peremptory at the costs of respondent.

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No. 6926.

THE STATE VS. JOHN WILLIAMS.

When no bill of exceptions is taken to any of the rulings of the lower judge during the trial of an application for a change of venue, his decision on the application can not be reviewed by this court.

The clerk of the Criminal Court is not qualified to act as a jury commissioner, under the Act No. 44, approved March 8, 1877, until he has taken the special oath prescribed by that act. His failure to take that oath before participating in the drawing of a jury, vitiates the drawing.

**A** PPEAL from the Fourth Judicial District Court, parish of St. Charles.  
Marks, J.

*H. N. Ogden*, Attorney General, for the State.

*James D. Augustin* for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant was indicted for murder, found guilty of manslaughter and sentenced to hard labor in the State Penitentiary, for the space of twenty years. He has appealed and alleges that the verdict returned against him, and the sentence based on that verdict, should be set aside and avoided, because :

1. Two applications made by him, one for a change of venue, the other for a continuance of the case, were improperly denied.

2. The jurors by whom he was indicted and tried were not legally drawn, inasmuch as the Clerk of the Court who acted as a member of the jury commission and assisted in the drawing, had not then taken—in that capacity—the oath required by law. This objection was urged on the first day of the term of the court.

3. The record does not show that a grand jury was empanelled, nor who composed it.

Defendant is a white man : he killed—in the parish of St. Charles—one Joseph Johnson, who belonged to the colored class, and the application for a change of venue is founded on the facts that—in said parish—the jury is composed of exclusively individuals of the same class as the

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deceased—that the homicide created considerable excitement and commotion in the locality where it occurred, and that several colored men manifested the intention of lynching him and hanging him without judge or jury—that, on account of the prejudice thus existing against him, he could not obtain an impartial trial in either the parish of St. Charles or any other parish of the Fourth Judicial District.

1. The facts that the killing of a human being created a considerable excitement, and that, if tried where the alleged crime was committed, the prisoner would be tried by jurors necessarily taken from the class to which the deceased belonged, are not of themselves sufficient to authorize a change of venue. The excitement which prevails on those grave occasions does not constitute that prejudice which disqualifies an entire community from entering the jury-box, to ascertain and determine whether the law has or has not been violated, whether an accused is or is not guilty of the commission of the crime charged against him.

As to the other branch of this objection, we can only say: that the whites are thoroughly convinced, and that the blacks should realize that justice must be done—not only to all—but by all. They are now—as the whites—called upon to pass upon the rights, wrongs, life and liberty of others—and, in the interest of their own race, they must learn how to impartially try, convict or release a prisoner, whatever may be the color of his skin.

Wharton Crim. Law, 7th ed. vol. 1, No. 469, paragraph 4.

As regards the locality where the trial is to take place, the rule is a constitutional one: the accused must be tried in the parish where it is alleged that the crime has been committed, unless *there* the public mind be clouded by and harbors a prejudice for or against the prisoner.

In this case, the District Judge decided that the apprehended prejudice did not exist, and, as no bill of exception was reserved to any of his rulings during the course of the trial of defendant's application for a change of venue, his decision on this point can neither be reviewed nor reversed.

2. Was the jury regularly drawn? The 3d section of act No. 44 of the Legislature, approved on the 8th of March, 1877, provides—in substance—“that the several District Judges throughout the State, shall select four discreet citizens, who—with the clerk of the district court, shall constitute a jury commission for each parish, etc., and that—*before entering upon the discharge of their duty, each member of the commission shall take an oath faithfully to discharge the duties imposed upon him by this act.*”

The Clerk who assisted in the drawing of the jury by whom the prisoner was indicted and tried, had not—when he so assisted—taken the oath prescribed by the act of 1877. The presiding Judge held that

he would judicially notice that the Clerk was a sworn officer. That was not sufficient—for the law expressly declares *that he is a member* of the jury commission, and—not that only the four citizens shall be sworn—but that *each* member of that commission shall take an oath, the very terms and form of which are specified in the act. When must *each* of those commissioners take that oath? *Before entering* upon the discharge of their duty as such. This, the Clerk did not do: he did not qualify as a jury commissioner, and that omission did vitiate the drawing of the jury by whom the accused was indicted and tried.

The act of 1877 provides, it is true, that three members of said commission shall be a sufficient number to perform the duties imposed upon it, but it also provides—in terms too clear and too imperative to be disregarded, that no one shall be qualified as a jury commissioner without being sworn in that capacity, and—by an irresistible inference—that, before so qualifying, no one shall participate in the drawing of juries. What three of the commissioners might have done without the presence of the others, the whole commission could not legally do with the participation of the unsworn clerk. His duties are the most responsible of those which devolve upon said commission: he makes, under its supervision, the *procès verbal* of its acts, the list of persons from whom the jurors are to be drawn, keeps a record of the drawing, showing the weeks for which the jurors are to serve, delivers to the sheriff and publishes, in the official journal, a list of their names, and—besides—the jury-box, with the evidence of each separate drawing, is left in his custody. All this he does—not under any power vested in him as clerk, but under the special power conferred on him as a commissioner. The regularity of his acts—in that capacity—or rather the presumption of that regularity flows from, and—under no circumstances—can precede his qualification, which springs and dates from the taking of the special oath prescribed by the act of 1877, an oath different from that administered to clerks, and destined to secure the performance of a newly created duty, imposed upon him in a newly created character, added and attached to his official title and official capacity, as the Clerk of the District Court.

The Legislature might have dispensed an already sworn officer from taking the additional oath prescribed by the act of 1877, but it did the very reverse, and—from the carefully selected and reiterated terms of the act—the Legislature intended to do the very reverse—for, by merely looking at the provisions of the statute, one can see that the Clerk is a member of the jury commission, that *each* member of that commission is commanded to take the prescribed oath—that, before complying with that imperative condition, not one of the commissioners is qualified, not one is authorized to *enter* on the discharge of his duties. The statute

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State vs. Williams.

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expressly directs that the oath shall be taken *before*, and—in this case—it was taken *after* the imposed duty had been accomplished.

In this instance, the selection of the jurors was not legal, and the inevitable result of that illegal selection was to affect the composition of the grand and petit jury, the validity of the indictment, the verdict and the sentence.

The prisoner has not been in jeopardy, was and stands charged with the crime of murder, and—as no prescription bars the prosecution of that crime, he should not be released on account of the informality which compels us to reverse the judgment pronounced against him.

It is, therefore, ordered, adjudged and decreed that the indictment filed on the 8th of May 1877, in the District Court for the parish of St. Charles, against John Williams, for the alleged murder of Joseph Johnson, is quashed and avoided, and that the verdict, sentence and judgment appealed from be and they are hereby annulled and set aside.

It is further ordered that said John Williams be held in custody until after the adjournment of the first session of the grand jury of the parish of St. Charles, which shall be therein empanelled after this decree is returned to the lower court, to answer to such charge as may be preferred against him for the alleged murder of Joseph Johnson.

The Chief Justice dissents from this opinion and decree.

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DISSENTING OPINION.

EGAN, J. The law makes the Clerk *ex-officio* a member of the board of jury commissioners. I think he is subject to no other qualification, and that he was not required to take a new or additional oath, and such I believe to have been the uniform practice in like cases. His membership and right to act as a member of the board of jury commissioners was complete by the appointment and terms of the law itself, and the duty to be performed being *ex-officio*, by reason of his office of clerk he acted as jury commissioner under all the sanctions of his official oath and obligations. I think the view taken by the district judge was correct, and that the provisions of the law in regard to the oath of members refer to those who do not act *ex-officio*. This is the more manifest when it is recollected that, almost from time immemorial, the clerks of courts as such have acted and been required to act in drawing juries. I therefore dissent on this point from the views of the majority of the court and from the decree.

No. 6896.

## SUCCESSION OF R. H. BAILY VS. M. A. BECNEL.

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The suit brought by an executor against a third person who is the undivided half-owner of certain property, of which the succession owns the other half, for the purpose of effecting a partition of the property, and also for a settlement of accounts with the defendant, does not involve probate matters, and therefore the probate court in which the succession was opened has no jurisdiction of the suit.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*Kennard, Howe & Prentiss* for plaintiff and appellant.

*Edward Phillips* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 13th of December 1877, George W. Baily—the executor with seizin of the last will of R. H. Baily—filed in the second district Court for the parish of Orleans, in which the testator's succession is opened, a petition in which he alleges:

"That since his appointment as executor, he has been administering this estate and making payments on account of the various legacies, as rapidly as was consistent with the best interest of the succession and of the legatees. That among the assets of this estate is an undivided interest in a certain sugar plantation, and an undivided interest in all the property and all the movables thereon, situated in the parish of St. John the Baptist, in this State, fully described in an inventory thereof, made May 17th, 1872, by Zenin Miller, deputy recorder of said parish, and filed in this Court, May 20th, 1872; which inventory is annexed to and made part of this petition, for a detailed description of said property.

"Your petitioner further shows, that a partition of said property has become necessary, in order that petitioner may realize, for distribution among the legatees, the share of the succession therein, they being unwilling longer to continue in joint ownership with Michel Alcide Becnel, a resident of the parish of St. John the Baptist, who was the owner of the other undivided half of said property, or with any person claiming to be his transferee. That such partition can not be made in kind, as the property can not be conveniently divided, and that a sale at public auction will be necessary in order to effect the partition.

"Your petitioner further shows, that as a necessary incident to said partition it is important to have a full, fair and complete adjustment of accounts connected with said plantation, and between the deceased and his estate and said Becnel, in order to ascertain what portion of the proceeds of said sale shall belong to each owner or *his representatives*.

"Your petitioner further shows, that said accounts were, for the most part, kept by the late commercial firm of G. M. Bayly & Pond, of

this city, and, since their dissolution, by other commercial firms domiciled in this city, and by petitioner, the executor, who has always resided in this parish, and kept the books of the estate here, and that said books cover the space of nearly eight years. \* \*

"Your petitioner further shows that he discovers, from such examination of the accounts as he has been able to make without the aid of the Court, that said part owner, Becnel, has become so largely indebted to this estate by reason of his failure to pay his share of the purchase money and after-expenses, since incurred with his consent, in running said plantation, that your petitioner believes and avers that, upon a full settlement of the affairs of said plantation, said Becnel or his transferee will have no interest or a very small interest in the proceeds of partition sale aforesaid. \* \*

"Wherefore petitioner prays for citation of said Alcide Becnel, and of Mrs. A. Provosty, wife of said Michel A. Becnel; that experts may be appointed and sworn to inventory and appraise said property, and to report whether or not it can be divided in kind by commission issued to that effect, according to law; that experts may be appointed and sworn to examine and report on the adjustment of said accounts; and, after due proceedings, that there may be judgment in favor of this estate and against said Becnel, and his transferee, if any, for whatever amount may be found to be due by him to this estate; that if said property can not be divided in kind, the sale thereof be ordered, according to law, to effect a partition, and that the proceeds of said sale of said plantation and movables may be applied by preference to the payment of the interest of this estate in said property, and the amount found to be due this estate by said Becnel, and for like relief against his transferee, if any there be."

The defendants, Becnel and his wife, except to the jurisdiction of the second district Court, on the grounds that they are domiciled in the parish of St. John the Baptist, in which is situated the property referred to in said petition, and that the district court holding sessions in and for said parish has alone jurisdiction of the executor's action.

The Constitution provides that the jurisdiction of the second district court shall be exclusively a probate jurisdiction—and the law "that the second district court shall be strictly a probate court, and shall have exclusive jurisdiction of only successions and probate causes." C. art. 83; Rev. St. Sect. 2011.

Is the suit filed by Baily's executor against Becnel and his wife a probate cause, one which relates to exclusively a succession, and in which alone the legal representatives of that succession are concerned? The executor asks the partition of movable and immovable property situated in the parish of St. John the Baptist, belonging partly to the

estate of R. H. Baily and partly to one of the defendants. He asks—besides—a full, fair and complete adjustment of the accounts of the planting partnership which existed between the deceased and Beemel, and a judgment against the latter for whatever amount may be found to be due by him to the estate of the former.

No branch of that clear demand constitutes a probate matter. The defendants do not hold as heirs, under a title derived from the succession, and their interest is entirely distinct from that claimed by the executor. When ascertained, fixed, severed from that of the defendants, the interest of the succession will pass under the control of the second district court, there to be administered upon and disposed of in accordance with the terms of the will, and there—it may be—to be again partitioned, and then only between those whose rights are predicated on a title derived from the succession, and held in common by them as heirs or legatees. The suit in and by which the representative of a succession seeks to recover, from a stranger, property or money, has none of those features which characterize a probate cause.

To sustain his demand and defeat defendants' exception, plaintiff relies on three articles of the Civil Code which we here transcribe:

"ART. 1135 (1128). If the deceased was in community or partnership with any one who has survived him, the curator of the vacant succession, or of absent heirs, *is bound*, immediately after his appointment, *to sue for a partition*, in order that the part which belonged to the deceased, in the community or partnership property, be ascertained."

"ART. 1137 (1130). Suits for partition *must be instituted before the judge of the place where the succession is opened*, and the *co-proprietors* and partners of the deceased, as well as his heirs, present and represented, *must be cited to appear before the judge in such suits*, though their domicile or ordinary place of residence be out of the jurisdiction of the judge."

"ART. 976 (971). All the rules relating to the acceptance, renunciation or partition of successions, the collation of goods and payment of debts, contained in this title are applicable to testamentary, as well as intestate successions."

Under the laws enacted after the adoption of the Constitution of 1812, the probate court's jurisdiction was concurrent with that of the district court in suits for a partition, when there was no dispute as to the title of the property to be partitioned—4 M. N. S. 78, 485, 509; 5 M. N. S. 9; 7 M. N. S. 469; 6 L. 423; 9 L. 534—and this court held, in April 1838, "that—then—the authority of the district court, to ordain and regulate a partition of property, owned in common by any other title than hereditary succession, at the suit of a co-proprietor, could hardly be questioned." 12 L. 219.

In 15 L. 33, Judge Martin—as the organ of the court—said: “The art. 924, No. 14 of the Code of Practice, must—in the latter as well as the first part of it, be *confined* to partitions of successions, because successions are the peculiar objects of the Court of Probates, which are courts of special and limited jurisdiction, and which can not be extended by implication to the exclusion of courts of general jurisdiction.”

10 L. 90; 15 L. 517; 1 R. R. 226; 11 R. 349.

In the case of *Boutté* against *Boutté*, we said in January;

“Here is not a succession to be settled, and property *exclusively its own* to be partitioned among the heirs of that succession.

“If after Charles’ death, François, who survived him, had immediately thereafter sued the succession of Charles for a partition of this property, can it be doubted that the court of ordinary jurisdiction would *alone* have had cognizance of the action. How is the case altered when François being also dead, a partition is sought of the property owned by two distinct juridical beings?

“The Second Court had not jurisdiction of the action, just as it is without jurisdiction of an action of partition between two individuals who are majors and own property in common, in their own right. \*

\* The articles of the Code, and the decisions of this court, cited by appellee, have reference to cases wherein the co-heirs of the same succession are seeking to divide the property which is common to all of them, and which they *derived from a common ancestor*.”

30 A. 182, 144.

It will be observed that, though the 1135th article of the Code, cited by plaintiff, ordains that—if the deceased was in community or partnership with any one who has survived him, the curator shall sue for a partition, it does not indicate in what court the suit is to be brought, nor does art. 1137 provide that it shall be brought in the probate court. It merely provides that suits for partition must be instituted before the judge *of the place* where the succession is opened, and—though they reside out of the jurisdiction of that judge, heirs, co-proprietors and partners must appear before him—but in what case? In every case of partition of a succession among co-heirs—C. P. 164—and also when the property to be divided is situated at the place where the succession is opened—otherwise, the action for a partition must be instituted in the parish where the property is situated, and—wherever they may be domiciliated, *there* the interested parties must be cited to appear. The Code so expressly commands. C. C. 1290 (1304); C. P. 165, No. 1.

So long as the succession is not settled and has not ceased to exist as a succession, so long as those therein interested preserve their quality of heirs, all suits which they may bring against each other, and all real

and personal actions, or others, which relate to the unsettled succession, must be brought where it is opened—C. P. 164—: but, when—by its acceptance—the succession disappears and the co-heirs become co-proprietors, the action for a partition among them is governed by articles 1290 (1304) of the Civil Code and 165 of the Code of Practice.

26 A. 611 ; 25 A. 143.

The present suit is not one to place the heirs in possession of property belonging to exclusively a succession; but one by an executor to divide, with third parties whose title is acknowledged, property belonging partly to those who are sued and partly by the legal representatives of a deceased person. It is a suit between co-proprietors and which should have been brought in the parish of St. John the Baptist, where the property sought to be divided is situated.

Defendants' plea to the jurisdiction was properly maintained.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

No. 6975.

C. S. STEWART vs. F. P. MIX, SHERIFF, ET AL.

Where a wife, authorized and assisted by her husband, purchases property in her own name, and the same is ever afterward given in to the tax collectors by her and her husband as *her* property, and the husband authorizes and assists her to execute a mortgage on the property, as *her* property, to secure a separate debt of hers, the husband is thereby estopped from setting up any title to the property, to the prejudice of a judgment creditor of the wife.

The fact that a justice of this court was of counsel for certain parties in two former suits, is no ground for his recusation in a subsequent suit in which the same parties are litigants, when it appears that the validity of none of the proceedings, and the decision of none of the questions involved in the previous suits, are put at issue in the subsequent suit.

**A** PPEAL from the Sixth Judicial District Court, parish of Tangipahoa.  
*Muse, Judge ad hoc.*

*Addison & Edwards* and *E. F. Russell* for plaintiff and appellee.

*M. A. Strickland* and *Robert R. Reid* for defendants and appellants.

The opinion of the court was delivered by MARR, J., on the original hearing, and by SPENCER, J., on the rehearing.

MARR, J. In 1854 Mrs. Mary W. Stewart, wife of Charles S. Stewart, authorized and assisted by him, purchased a lot of ground, number six, in the square number seven, in the town of Amite, now Amite City. The conveyance was made to her by notarial act; and, in 1856, it was recorded in the parish in which the property was situated.

Community existed between these parties up to August 2, 1861, when



it was dissolved by judgment. In 1867 Mrs. Stewart bought some property of Brooks, and gave him her note for \$3000, on account of the price; and by decree of this court, in November, 1874, she was condemned to pay that debt. 26 A. 714.

Brooks died; and his heirs caused execution to be issued upon that judgment, under which the sheriff seized, and was about to sell the lot number six, when the sale was arrested by injunction, at the suit of the husband, Charles S. Stewart, who alleged that he was the owner of the property, and that it was his homestead; that it does not exceed in value \$2000, and that his wife does not own in her own right property to the amount of \$1000.

The heirs of Brooks answered by general denial, and they pleaded, specially, that "C. S. Stewart, plaintiff, is estopped from claiming the ownership, and setting up any title to the property described in his petition, having repeatedly and publicly acknowledged the same to be in his wife, M. W. Stewart."

The district judge having recused himself, the case was tried by James H. Muse, Esq., a member of the bar, judge *ad hoc*. The judgment was in favor of plaintiff, perpetuating the injunction; and the defendants appealed.

It was proven that the lot number six was purchased during the existence of the community; that its value does not exceed \$2000; that the wife does not own property to the amount of \$1000; that there are several children of the family; and that the family residence is on this lot.

We do not think it necessary to decide whether the property situated in a town would be exempt under the homestead law; because, if it belongs to C. S. Stewart, it is not liable to seizure under execution on a judgment against his wife, for her separate debt; and, if it does not belong to him, he can not oppose the sale and claim the benefit of the homestead exemption.

The notarial title in the name of Mrs. Stewart was offered in evidence, and a copy of the judgment in 1861, dissolving the community. Copy of the decree of this court, as reported in 26 A. 714, was also introduced; and the returns for a series of years made by Stewart and his wife to the tax collectors, showing that Stewart returned as his entire real estate certain lots of small value, and that Mrs. Stewart returned the lot number six. Called as a witness, Stewart said the property was assessed in the name of Mrs. Stewart because the title was taken in her name; that the purchase was made during the existence of the community, and that he paid the taxes.

Defendants also offered in evidence a copy of a mortgage, granted by Mrs. Stewart, authorized and assisted by her husband, on this lot

and several others, to secure to William Acy \$2000, "cash loaned to her for her separate and individual benefit." This act is dated April 8, 1867; and it was recorded on the twenty-seventh April.

Several bills of exception were taken during the trial to the ruling of the court in admitting the testimony offered by defendants. It is not necessary to notice them in detail. It suffices to say that all the evidence thus offered tended to show title in the wife, and recognition and public acknowledgment of her title by the plaintiff, her husband; and it was properly received.

No part of the proceedings in the suit for dissolution of the community was offered, except the judgment. It decreed that the community be dissolved; that plaintiff have the administration of her separate estate, and of such property as she might thereafter acquire; that there be judgment of nonsuit on her "demand for money, slaves, and land," reserving to her the right to establish her claim to the money and property in a future suit.

As this judgment in no way indicates what money or slaves or land the wife claimed, it is of no value, except to show the simple fact that such a judgment was rendered on the second August, 1861.

Plaintiff relies solely on the legal presumption that all property purchased during the existence of the community belongs to the community; and the judge *ad hoc* based his judgment on that presumption. We have frequently had occasion to say that this, like all other mere presumptions, may be rebutted by proof. It is certainly not sufficient in this case to establish title in the husband.

For nearly a quarter of a century this property has stood upon the public records in the name of the wife; and nearly seventeen years have elapsed since, by solemn judgment, the husband and wife were separated in property. During this long period her title has not been attacked or questioned, so far as the record informs us. If this were a suit by a creditor of the husband to subject the property as his, it would be manifestly unjust to require of her the same strictness of proof now that would have been proper when the acquisition by her was recent, and when she might have proven by witnesses now dead, or beyond her reach, that she made the purchase with her own paraphernal means, administered by herself exclusively.

But that is not the question we are dealing with. The husband, in order to shield the property from the just pursuit of his wife's separate creditors, asks the court to presume that the conveyance to his wife, in 1854, to which he was a party, was a mere sham, a false pretense; that in 1867 he authorized and assisted her in an act of mortgage to secure a loan for her separate, individual benefit, and thus made himself a party to a false assumption of ownership; and that from year to year in the

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Stewart vs. Mix, Sheriff.

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annual returns of the property for taxation he contributed actively to the repeated, public, false assertion of ownership; thus interposing a barrier to the pursuit of the property by his own creditors.

The reported decisions of this court teem with cases in which, upon the mere legal presumption resulting from the date of the acquisition, property the title to which was in the name of the wife has been subjected to the debts of the community. This is the first case which has fallen under our observation in which the husband has sought to arrest the sale of property standing in the wife's name, at the suit of her creditors, or has asserted title in himself for any purpose on this mere legal presumption. See *Meadows vs. Dick*, 13 A. 377.

This whole proceeding is bad in law, and equally bad in morals. If the wife is not really the owner of this property, the husband has done all that he could to establish and confirm the ownership in her, and to mislead the public as to the real ownership. If her title is apparent, not real; if it rests upon a basis of false pretenses and assumptions, the husband's hand must not be the first that is raised to strike down the fabric of which he was the chief architect.

Defendants have prayed for the statutory damages, twenty per cent on the amount enjoined; but they did not introduce the writ under which the seizure was made, nor offer any evidence which would enable us to ascertain the amount on which damages should be estimated. They are clearly entitled to damages for the abuse of the process of injunction; and their right to sue for and recover them must be reserved.

The judgment of the district court is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the injunction granted in this case be dissolved; that the demand of plaintiff be rejected, and his suit be dismissed; that the right of defendants to proceed against the plaintiff and his sureties on the injunction bond for damages for the wrongful obtaining of the injunction be reserved; and that the said Charles S. Stewart, plaintiff and appellee, be condemned to pay all the costs of this proceeding in this court and in the district court.

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ON REHEARING.

SPENCER, J. It seems that in 1869 suit was instituted by one E. H. Caldwell against Mrs. M. W. Stewart and husband, C. S. Stewart, on a mortgage note of the wife for \$3000. In that suit, it is said, Mr. Justice Marr, of this court, was of counsel for Mrs. Stewart and husband. That suit was dismissed, as in case of nonsuit, without trial. Subsequently, it was renewed in the name of M. D. Brooks, for use of Caldwell vs. Mrs. Stewart and husband, but the style of the suit was "Brooks vs. Stew-

art." This last suit resulted in a decree of this court, 26 A. 714, in favor of plaintiff. In this last case, Mr. Justice Marr was not pretended to have been of counsel. The present suit is an injunction by the husband, C. S. Stewart, against the sale of certain property under execution of said judgment in Brooks vs. Mrs. Stewart and husband, on the ground that the property seized belongs to the community, and is not liable to seizure under a judgment against the wife. The property seized is not that upon which the judgment in Brooks vs. Stewart recognized the mortgage. The present suit in no way involves the validity of the judgment of Brooks vs. Mrs. Stewart; nor the title or status of the property mortgaged in that case. But the counsel of C. S. Stewart, in his application for rehearing, for the first time suggests that Mr. Justice Marr, who delivered the opinion herein, should have recused himself; and insisted upon this as one of the grounds for rehearing. We do not think that the facts stated necessitate or even authorize a recusation. The sole question involved in this suit is whether a certain piece of property, in no way connected with the previous litigation, is the property of the community between C. S. Stewart and wife; and whether it is liable to seizure for the wife's debt. Justice Marr was never "employed or consulted" in reference to any of these matters, as an attorney. We do not see how the fact, if true, that he appeared as an attorney for Mrs. Stewart and husband in defense of the first suit, which was dismissed, or even in the renewed suit, in which Brooks obtained the judgment, could furnish cause of recusation in this suit, unless the validity of some of the proceedings in said previous suits or some of the questions then involved were brought again in question in this suit. We have seen that such is not the case; that the only thing connecting the present suit with the previous ones is that the judgment sought to be executed and enjoined was rendered in said former suit; but the validity, legality, and effect of that judgment, or of any of the proceedings leading to it, are in no wise contested in this case. Justice Marr, however, though unconscious of having ever been of counsel at all, induced us to grant a rehearing.

We have reconsidered with great care the facts of this case, and the very elaborate and able argument of plaintiff's counsel; but we are confirmed in the correctness of the decree heretofore rendered. The fundamental error of plaintiff's argument is in supposing that Stewart, the husband, has the same rights as *his creditors* would have if attacking the sale. The question as to Stewart is one of estoppel. No principle of law is better settled than this, that one will not be heard in his own interest to controvert or deny the truth of a state of facts which he has openly and publicly led others to believe, and upon the faith of which they have acted.

Stewart vs. Mix, Sheriff.

This property may indeed be community property, but C. S. Stewart has, by his acts and conduct, debarred himself from asserting it to the prejudice of third persons. Thus, I may be the undoubted and absolute owner of a piece of property, yet if by my acts and conduct I hold another out to the world as owner, I will not be heard to assert my claim to the prejudice of those who may have been misled by me. We see no reason to doubt the correctness of the opinion and decree heretofore rendered.

It is therefore ordered, adjudged, and decreed that our former judgment and decree remain unchanged.

Mr. Justice MARR takes no part in this decision.

No. 6632.

D. LANDRY VS. FRANÇOIS VICTOR.

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Where a mortgage debtor who has taken a suspensive appeal from an order of seizure and sale is cast on appeal, the mortgage creditor, who has subsequently obtained a judgment against the debtor for the balance due after deducting the proceeds of the mortgaged property, has a right of action, for the amount of the judgment, against the surety on the appeal bond of the mortgage debtor, from the moment the return of *nulla bona* has been made on the execution issued under the judgment.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

*Robert J. Ker and A. L. Tucker* for plaintiff and appellee.

*Louque & Fernandez* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. The grounds urged for the dismissal of this appeal, we consider as untenable; but, the conclusion to which we have come, dispenses us from the necessity of discussing those grounds.

D. Landry, as holder of a claim secured by mortgage, applied for and obtained an order commanding the seizure and sale of the property subject to that mortgage. His debtor, François Victor, the owner of said property appealed from the order of seizure and sale, and Lacroix became his surety on his appeal bond.

That bond is for \$3000: its condition is "that François Victor shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the sale of his estate real and personal—if he be cast in the appeal: otherwise that said Lacroix shall be liable in his place."

François Victor was cast in the appeal, and the decree appealed

from and affirmed by this Court was not satisfied by him, nor satisfied by the sale of his property. Has Landry an action on the bond signed by Lacroix, as the security of Victor? Does that bond contain an obligation which may be enforced against any one? The counsel representing appellant, the transferee of one of the legal representatives of said Lacroix, contend that his estate is not bound, because:

1. As the judgment was but an executory proceeding, and the mortgaged property has been sold, the condition of the bond has been fulfilled and the surety discharged.

2. As no writ could have been issued on the executory process and returned *nolle prosequi*, no recourse can be had against the surety.

3. There was no decision rendered on the validity of plaintiff's claim, and the appeal did not deprive him of any right.

4. Suretyship can not exceed what may be due by the debtor, nor contracted under more onerous conditions.

This defense is certainly ingenious, but rests on technicalities.

The order of seizure and sale was issued on an act importing a confession of judgment; from the decree commanding the execution of that confessed judgment, defendant was allowed a suspensive appeal—the appeal was not successfully prosecuted—the writ of seizure and sale executed, and the mortgage claim partly satisfied by the sale of the mortgaged property; for the balance, plaintiff obtained a judgment against Victor, the principal on the appeal bond; from that judgment an execution was issued, and the sheriff's return is that he found no property of defendant upon which to levy. From the date of that return plaintiff's right of action on the bond, has accrued.

The law does not make the distinction contended for by appellant's counsel, between the suspensive appeal taken from an order of seizure and sale and any other suspensive appeals, as regards the liability of the surety on the bond. It provides "that in all cases of appeal to the Supreme Court, or other tribunals in this State, if the judgment appealed from be affirmed, the plaintiff may—on the return of the execution that no property has been found, obtain a decree against the surety on the bond for the amount of the judgment, etc."

Rev. St. of 1870, Sect 37.

C. P. 575-579.

27 A. p. 706-707.

Were we to rule otherwise, to legislate a distinction which is not in the law, which is repugnant to the letter and spirit of the law, which would defeat its object and destroy its value, no creditor would dare—thereafter—proceed by the executory process. That process, now one of the highest guaranties of the creditors, would have to be carefully avoided as an obstacle, an impediment, a danger: instead of hastening,

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Landry vs. Victor.

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it would invariably retard the recovery of the debt—as, in every case, the execution of a decree based on a confession of judgment, would be suspended by an appeal and obstructed by a nameless bond, by the counterfeit of an obligation, by a worthless document which would bind neither the principal nor the surety, neither for the debt nor for the costs.

The real complaint of defendant is that—instead of only one, two judgments have been rendered, two executions issued against the principal on the bond. The condition of the bond is not that if executions issue and any thing be seized and sold, the surety shall be released; it is, when the appellant is cast, that—unless he satisfies the judgment—his surety shall be liable. Not one of the two judgments, not one of the two executions has been satisfied, and the surety is bound for the balance due by Victor to Landry. If not, such a bond has but one effect: to suspend an impending execution: it is good against the creditor alone—never against the principal or his surety.

The district Judge has, by a correct decree, enforced a plain, a legal obligation.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby affirmed with costs.

MARR, J. I do not concur in the opinion and decree pronounced in this case; and reserve the right to assign the grounds of my dissent hereafter.

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ON REHEARING.

DEBLANC, J. François Victor appealed from an order of seizure and sale, and—to do so—furnished bond in the sum of three thousand dollars, with one Lacroix as his security.

That appeal and that bond suspended the execution of a decree or order—by whatever name it may be called—based on Victor's own confession of what the law styles "a judgment."

Does the bond—in such a case—evidence a legal obligation, one which can be enforced according to its express terms, and against either the principal or security by whom it was subscribed, or is it merely the semblance of an obligation, which can be used—without apprehension or risk—to delay the execution of a confessed judgment?

Our opinion has not changed; we have held and we hold that one who—as security—assists in suspending, by a groundless appeal, the execution of an order of seizure and sale, is liable—to the extent of his obligation—for whatever amount of the confessed and affirmed judgment is not paid by or recovered from the principal on the appeal bond.

It is, therefore, ordered that our former decree remain undisturbed.

## DISSENTING OPINION.

MARR, J. Landry proceeded, *via executiva*, on two notes of Victor, secured by mortgage, aggregating in principal and interest about \$2000; and the order of the judge was indorsed on the petition in the usual form: "Let executory process issue, as herein prayed for, and according to law." Victor appealed from this order, and gave bond in the sum of \$3000, with François Lacroix as his surety, conditioned for the satisfaction of such judgment as might be rendered against him on the appeal. This court rejected certain items of cost and expense claimed in the petition of Landry; and affirmed the order appealed from, the appellee paying the costs of appeal. Opinion Book 44, p. 54.

The sheriff proceeded with the writ of seizure and sale. The mortgaged property was sold for \$1350; the costs, including attorney's fees, amounted to \$208 28; the taxes, due for several years, aggregated \$662 67; and there remained only \$479 05 to be applied to the mortgage debt. Landry then brought suit on the two notes against Victor, *via ordinaria*, to recover the balance, \$1704 95, with interest and costs; and judgment was rendered accordingly; on which execution was issued, and returned, "no property found." He then took a rule on Lacroix, the surety on the appeal bond in the executory proceedings, to show cause why execution should not issue against him. The rule was made absolute; and Lacroix took this appeal from the judgment condemning him to pay the balance, \$1704 95, with interest and costs.

The proceeding by seizure and sale is *ex-parte*, and anomalous. The creditor exhibits to the judge, in term or in vacation, authentic evidence of the debt, and of the mortgage by which it is secured; and prays that the mortgaged property be seized and sold, and the proceeds applied to the payment of the mortgage debt. On this, the judge grants the order, the usual form of which is: "Let executory process issue as prayed for, and according to law." No previous notice is given to the mortgagor; no citation is issued; nor is any opportunity afforded to him to object to the granting of this order. The first notice he gets is by service of a copy of the order, and a demand of payment; and his property will be advertised and sold, unless he appeals within ten days, or obtains an injunction on opposition, or by separate suit.

No personal judgment is asked for or rendered, and none can be rendered against the mortgagor. The proceeding is purely *in rem*, against the property mortgaged; and no other property can be seized or sold under the order and writ. With the sale of the mortgaged property the proceeding is at an end, *functus officio*, and the return of the sheriff is the official proof that the mandate of the court, the order of seizure and sale, the judgment, if that word be preferred, has been



obeyed and fully executed. If the proceeds do not suffice to pay the mortgage debt, no further proceeding can be taken in that suit; and the creditor is compelled to bring a new suit, a suit *in personam*, against the debtor, the mortgagor, in the ordinary form, to recover the balance, just as he would proceed on any other ordinary unsecured debt.

It was doubted at one time whether the order of seizure and sale was such a judgment as entitled the mortgagor to appeal. The right of appeal was recognized in *Day vs. Fristoe*, 7 Mart. 239, and in *Tilghman vs. Dias*, 12 Mart. 691, and it was conceded in subsequent cases without serious question. *Gurley vs. Croquet*, 3 N. S. 498; *McDonough vs. Fort*, 14 La. 350. The nature and extent of this order were elaborately discussed in *Harrod vs. Voorhies*, in 16 La. 254; and the right of appeal conceded; and this was followed in *Bank vs. McKee*, 2 A. 461; *Mathé vs. McCrystal*, 11 A. 4; and *Riley vs. Christie*, 13 A. 256.

In *Harrod vs. Voorhies* the question was whether the order of seizure and sale was a judgment in the sense that it prevented the running of prescription on the note on which it was founded. It was admitted as settled doctrine, and it is not to be questioned, that an appeal lies from this order: and the court went on to say that when an authentic instrument importing confession of judgment is presented to the judge, with a petition praying for executory process, he must examine and decide whether it unites all the requisites of the law necessary to authorize this summary proceeding. "So far it is a judgment, and an appeal must lie from it, as from all other orders of court that might work irreparable injury. \* \* \* But such a decree is not a judgment in the true and legal sense of the term, and possesses none of its features. It issues without citation to the adverse party; it decides on no issues made up between the parties; nor does it adjudicate to the party obtaining it any right in addition to those secured by his notarial contract. If such an order was a real judgment, it would be out of the power of the judge granting it to set it aside; after rendering this decree he would be divested of all jurisdiction, and it could be reversed only by means of an appeal, or a separate action of nullity: Whereas, it is every day's practice for the judge issuing such orders to set them aside on a rule to show cause or on opposition; and in most cases the proceedings are turned into an ordinary suit, in which final judgment is afterward rendered. Such a decree, then, can be viewed only as giving the aid of the officers of justice to execute an obligation which by law produces the effects of a judgment in relation to the particular property mortgaged." P. 256, 257; see, also, *Chamblis vs. Atchison*, 2 A. 490, 491.

And, again, p. 257: "Plaintiff's note and mortgage have not merged in the decree made on them, as they would have done in a contradictory

judgment rendered by a competent court. If they were liable to prescription, surely the decree of the district judge granting executory process on them could not shield them from its operation."

The proposition that this order is not a judgment in the true and legal sense of the term, and possesses none of its features, was repeated in the same language in *Riley vs. Christie*, 13 An. 256, where it was decided that it is not a "judgment" in the sense of the Constitution, for which reasons must be specially adduced in the order itself. The doctrine that this order does not prevent the running of prescription was not questioned, so far as I am advised, until 1853, when in *Rhea vs. Taylor*, 8 An. 24, it was decided that service on the mortgagor of notice of seizure interrupts prescription.

This decision seems to rest upon the mere assumption that *Harrod vs. Voorhies* had been overruled in this respect by *Stanborough vs. McCall*, 4 An. 324, and *Fortier vs. Zimple*, 6 An. 54. In *Stanborough vs. McCall*, the proceeding *via executiva* was suspended by injunction; and in *Fortier vs. Zimple* it was arrested by the opposition of the mortgagor: and, in both cases, the litigation was protracted by the action of the mortgagors. These circumstances distinguish these two cases; and in any case so long as the hands of the mortgagee are tied, and the enforcement of his rights suspended and delayed by an injunction suit or an opposition, prescription can not run, upon the well-known maxim, *contra non valentem*. The court did not, in either of these cases, question the correctness of the decision in *Harrod vs. Voorhies*; and the decision in *Rhea vs. Taylor* is mere assertion, not supported by any principle stated by the court, nor by any previous decision. Citation interrupts prescription, because the law has expressly so provided; but the notice of seizure served on a mortgagor is not a citation; it has none of the features of a citation, and none of its effects; and no law declares that it interrupts prescription.

In *Rhea vs. Taylor* the defendant, in answer to the suit *in personam*, to recover the balance not satisfied by the sale of the mortgaged property, specially admitted the execution of the notes, and pleaded an open account in compensation "of any amount that may be found due," etc. After the suit had been pending some five years, he pleaded prescription. The plea in compensation was the assertion, the judicial admission, of mutual co-existing indebtedness; and it was not necessary to place the decision overruling the plea of prescription on any other ground than that the first plea was an acknowledgment of indebtedness.

In *Walker vs. Lee*, 20 An. 192, the proceeding *via executiva* was arrested by injunction. Subsequently, suit was brought *in personam*; and defendant pleaded prescription. The court considered the question settled by *Stanborough vs. McCall*, *Fortier vs. Zimple*, and *Rhea vs. Taylor*; and the plea was overruled.

In *Roupe vs. Carradine*, 20 An. 214, the proceeding *via executiva* was not enjoined; but the writ was returned by order of plaintiff's attorney. The court lost sight of the fact that this was an abandonment of that proceeding; and, on the assumption that *Walker vs. Lee*, and the cases there cited, had settled the question, overruled the plea of prescription. Properly understood, *Harrod vs. Voorhies* is not shaken by *Stanborough vs. McCall*, *Fortier vs. Zimple*, and *Walker vs. Lee*, in all of which plaintiffs were stopped and delayed in the enforcement of their rights by the acts of the defendants; and the maxim *contra non valentem* was perfectly applicable: and in *Rhea vs. Taylor* and *Roupe vs. Carradine* the court evidently failed to observe the distinguishing characteristics of the earlier cases relied upon, that in all of them the proceeding *via executiva* was suspended by opposition and by injunction.

By act of 1846, p. 166, so much of articles 746, 747 of the Code of Practice as authorized executory process on judgments obtained in other States and in foreign countries was repealed. In several cases orders had been granted making executory judgments rendered in other States which the parties were endeavoring to enforce when the act of 1846 was passed. This court held that the repeal of the law put an end to the proceeding *via executiva*; and that the judgment creditors must sue upon their judgments *via ordinaria*. There could not have been a more authoritative recognition and enforcement of the doctrine laid down in *Harrod vs. Voorhies* and *Riley vs. Christie*, that the order of seizure and sale is not a judgment in the true and legal sense of the term; and that it is merely giving the aid of the officers of justice to enforce a judgment obtained elsewhere, or a contract to which the law attributes the effect of a judgment with respect only to the property specially mortgaged. If the order making a judgment executory had been itself a judgment, it would have created a vested right in the plaintiff; it would have been his property from the moment it was granted; and by the Constitution of the United States and the constitution of Louisiana it could not have been annulled by any subsequent action of the Legislature. It was only because this order was merely a mode of proceeding, and was neither a judgment nor a contract, that it was subject to legislative control and repeal. C. P. art. 548; *Scott vs. Duke*, 3 An. 253; *Kilgore vs. Bank*, 3 An. 693; *Bank vs. Markham*, 3 An. 699.

It will be observed that, while the Codes attribute to the contract upon which executory process is granted the effect of a confession of judgment, in so far as the mortgaged property is concerned, the order of seizure and sale is not called a judgment. In the Civil Code, 1808 p. 460, art. 40, 1825, art. 3361, it is called "an order for the immediate seizure" of the thing mortgaged. In the Code of Practice it is called "an order": arts. 66, 735, 736, 738, 742. The use of the word *judgment* seems to have

been studiously avoided in art. 738, where "the debtor against whom this *order of seizure and sale* has been rendered," is authorized to have the sale suspended by injunction; and in article 742, where, on proof of the grounds alleged in the opposition, the judge is required to *revoke the order of seizure and sale*." It is usual to speak of a judgment as having been rendered; and the invariable use in the Codes of the word *order* shows that the compilers designed that this fiat of the judge should be an *order* merely, and not a *judgment* in the sense of the law. Article 549 of the C. P. plainly declares that *orders* of court, "such as mandates of arrest and of seizure," are not termed judgments, though they have the same effect; that is, they must be obeyed and enforced, unless they are set aside or revoked. A judge has no power to revoke a judgment. Once rendered, it is the property of the party in whose favor it has been given; and the judge can not alter it, except on new trial, or to change the phraseology, or to correct some error of calculation, or some clerical error: C. P. arts. 547, 548. In an action of nullity he may decree it to be void, and may enjoin it perpetually; or he may rescind it at the suit of a minor or absent defendant. C. P. arts. 556, 614, 615. The order of seizure and sale, therefore, is not a judgment in the legal acceptance of the word, since the law so declares in art. 549 of the C. P., and the judge who granted it is required to revoke it on proper proof; art. 742; and because the Codes call it an order, and never speak of it as a judgment.

There are important distinctions between the order of seizure and sale, granted on an act *importing* confession of judgment, and the order making executory the judgment of a different tribunal. In the one case the order and writ require the sale of the mortgaged property alone; in the other a common writ of *fiery facias* issues, and may be levied on movables and immovables, rights and credits of the debtor. In the one the sale may be suspended by injunction, on opposition without security; while in the other the judgment debtor can not obtain an injunction without bond and security, as in other injunction suits. C. P. art. 750.

When the word "judgment" is used in the Code of Practice, it means the decision of the judge in a contradictory proceeding; and it does not include in that term orders of seizure or of arrest, or other mandates which courts may grant. Judgments require the party condemned to do some thing or to pay some thing: the order of seizure and sale does not require the mortgagor to do any thing or to pay any thing, not even costs; it is granted on the *ex-parte* application of the mortgagee, without an opportunity having been afforded to the mortgagor to be heard; and he knows nothing of the proceeding until he is informed, by subsequent notice, that an order has been granted, under which his property is about to be seized and sold: and he must seek relief, either

by opposition, in the nature of an answer to the demand, or by separate suit and injunction. Judgments are rendered after the parties have been heard, or have had the opportunity to be heard; the mortgagor is heard only after the order condemning his property to be sold has been granted; and then he can only proceed by injunction or by appeal!

This proceeding, *via executiva*, was in use under the dominion of the Spanish law; and it prevailed in France to enforce contracts, *ACTES* or *TITRES*, "important exécution parée." Merlin, vo. *Exécution Parée*, tells us that this term was applied to the execution "qui peut se faire en vertu de l'acte tel qu'il est, sans avoir besoin d'autre formalité ni d'autre titre, le mot *parée* n'est, comme l'en voit, que la traduction de l'expression Latine, *parata*; et le sens en est que tel acte est prêt à recevoir son exécution."

In the Code of 1808, p. 460, art. 40, and of 1825, art. 3361, the phraseology of the French law is adopted; and the words of the French text are "*emporte exécution parée*," which, in the English version are, "amounts to a confession of judgment." There is no word in the French text which can be translated either *judgment* or *confession*; and there are no three words in the English language which can express the meaning of the three French words, "*emporte exécution parée*." The reason of this is obvious. No English speaking people have any analogous proceeding, nor does the English system attach sufficient importance to any contract whatever, to permit execution to issue upon it under which the property, which is the subject of the contract, may be seized and sold, without a previous contradictory judgment or decree. Of course, no people would have or require words to express a thing of which they have no knowledge.

The compilers of the Code of Practice adopted the same phraseology in describing acts upon which the order of seizure and sale may be granted. Article sixty-three declares that the creditor who has against his debtor "*un titre important exécution parée*," shall be entitled to have the hypothecated property seized immediately and sold. The English translation is "*a title importing a confession of judgment*." In article sixty-six the phrase is varied in the French: "*porte exécution parée*," which is also translated "*imports a confession of judgment*," and in article ninety-eight the expression in the original text is, "*un titre important exécution parée*," which is translated in the English text, "*an act or title importing confession of judgment*."

Article 732 uses the words "*acte important l'exécution parée*," which is translated "*an act importing a confession of judgment*." Conscious of the fact that there was no English equivalent for these French words, the compilers have expressed their meaning paraphrastically, in article 733: "An act is said to import a confession of judgment in matters of privi-

lege and mortgage, when it is passed before a notary public, or other officer fulfilling the same functions, in the presence of two witnesses, and the debtor has declared or acknowledged the debt for which he gives the privilege or mortgage."

Every promissory note is a declaration and acknowledgment of a debt; and the fact that the maker adds to this acknowledgment a formal contract by which he grants a mortgage or a privilege to secure the debt no more makes that contract a confession of judgment in any just sense of the words than would a similar acknowledgment in a contract which grants no mortgage or privilege. To give additional facility to the enforcement of mortgages and privileges, the law-maker has seen fit to allow the mortgage creditor to seize and sell the mortgaged property, without the delay of obtaining a contradictory judgment; but it has not chosen to elevate the contract to the dignity of a judgment, or to give it the effect of a judgment, except in so far as execution of the contract, by the sale of the mortgaged property, is concerned. Where there is a confession of judgment, the creditor may obtain, upon exhibiting it, a real judgment, which may be enforced by the seizure and sale, not merely of the property specially mortgaged to secure it, but of any other property of the debtor subject to execution.

The paucity of the English language does not admit of a translation of the original French of our Codes, "*emporte exécution parée*;" and the compilers have sufficiently shown what they meant by the mis-translation "*imports a confession of judgment*," by limiting it to contracts clothed with certain prescribed formalities, and restricting its effects to the property specially designated and affected.

There are other considerations not less conclusive. Death puts an end to the capacity to stand in judgment; and that which belonged to a man up to the moment of his death passes, *eo instanti*, into the ownership and dominion of another. But the death of the mortgagor is no obstacle to the granting of the order, and to the seizure and sale of the mortgaged property. No judgment can be rendered against the executor or administrator of a succession, except for the purpose of liquidating a debt which he does not acknowledge; and that judgment is always guarded with the qualification that it be paid in due course of administration; and it can not be enforced by execution. But, although the mortgagor be dead, and the mortgaged property be inventoried as belonging to the succession, and the succession be in regular course of administration, the mortgagee may go into a court of ordinary jurisdiction, and obtain the order of seizure and sale, and have the mortgaged property sold by the sheriff, in accordance with the terms and conditions of the notarial contract of mortgage. It necessarily follows, therefore, that the order of seizure and sale is not a judgment; it is an *ex-*

*parte* order; and it is executed by the sale of the mortgaged property, whether the mortgagor be living or be dead.

Having thus ascertained the nature, extent, and effect of the order of seizure and sale, and the restricted sense in which alone it can be treated as a judgment, it remains to inquire what are the obligations assumed by the surety in the bond given for an appeal from that order.

The condition of the bond is that prescribed by the Code of Practice, art. 579, that the appellant shall prosecute his appeal, and "shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in the appeal; otherwise, that the surety shall be liable in his place."

The Code of Practice, article 575, requires that the bond for a suspensive appeal shall be for a sum exceeding by one half the amount of the judgment appealed from, when it is for a specific sum. If the judgment be not for a specific sum, but for the delivery of some movable of a perishable nature, the bond must be for an amount exceeding by one half the estimated value of such movable. Art. 576. If the judgment decree the delivery of real estate not of a perishable character, the bond must be for a sum exceeding by one half the estimative value of the revenue to be derived from the property pending the suit; and for such additional sum as the judge may determine as security for any injury or deterioration which may be caused to the property by the appellant while it remains in his possession. Art. 577.

If the actual owner of real estate sue one wrongfully in possession, and obtain judgment decreeing him to be the owner, and to be entitled to immediate possession, no judge would think of requiring the defendant to give bond for the value of the property, much less for a sum exceeding that value by one half, in order to appeal suspensively. In all such cases the bond must be fixed in accordance with the requirements of article 577. Is it possible to suggest any good reason for requiring the mortgagor, appealing from an order of seizure and sale, to give bond for a larger amount than would be required of him if he were defendant in a petitory action, appealing from a judgment decreeing the ownership and right of possession of that same property to be in the plaintiff? The mortgage does not give the mortgagee any title of ownership, nor right of possession, nor does the order of seizure and sale. The mortgage creates a lien, a right to be paid out of the proceeds of the sale of the mortgaged property; and the order simply requires the property to be sold, and the contract right of the mortgagee to be enforced. Why should the mortgagee, proceeding in the most expeditious manner known to the law, having the right to a summary trial, as well in the district court as in the appellate court, in the event of

opposition by the mortgagor, be secured by a bond for a larger amount than the real owner could require, who is delayed, and who must await the slow movement of regular proceedings in order to obtain possession and enjoyment of his property, wrongfully withheld by the appellant?

It is immaterial what the amount of the bond may be, except in so far as the enjoyment of the right of appeal may be improperly obstructed by requiring an unreasonable bond, and that the liability of the surety can not exceed the amount fixed. The precise obligation is to satisfy such judgment as may be rendered by the appellate court against the appellant, on the appeal. As was well said in *Wilson vs. Churchman*, 6 A. 469: "We know of no instance in which sureties on an appeal bond have been held liable, except on the judgment of the court of the appeal;" and by the very terms of the appeal bond, as prescribed by the Code of Practice, art. 579, the satisfaction of the judgment rendered by the appellate court discharges the obligation of the surety.

*Wilson vs. Churchman* is an instructive case. Plaintiffs had sold a lot of flour to Churchman, which was put on board a ship, consigned to parties in Philadelphia. After the bill of lading had been sent by mail to the consignees, plaintiffs sued for the price and sequestered the flour on the ship, under their lien as vendors. Gilchrist, as master and part owner of the ship, bonded the flour, and the ship transported and delivered it as consigned. Gilchrist intervened by way of third opposition, alleging his obligation to deliver the flour, in accordance with the bill of lading, and his right to the custody and possession of it for that purpose. The judgment of the district court, on rule, maintained the sequestration; and, on the merits, the opposition of Gilchrist was dismissed. He appealed; and this court reversed the judgment on the rule, and set aside the sequestration, and affirmed the judgment dismissing the opposition. The case was remanded "for the sole purpose of ascertaining the value of the flour sequestered at the date of the bonding by Gilchrist, and of rendering judgment against him for that value, subject to credit for such payments as may have been made by Churchman." 4 A. 456.

Judgment was rendered in the district court against Gilchrist for \$3500; and, on a return of "no property found," the sureties on the appeal bond on the first appeal were condemned to pay the amount; and they appealed. This court held that they were not liable. After the language first quoted above, the court said:

"The Code of Practice, article 575, evidently looks to the responsibility attaching in a definitive judgment on the appeal, and seems to us to exclude the idea of the surety binding himself to abide by the action of any court other than that of the court to which the appeal is taken. The same sense, we think, prevails in article 579." 6 A. 469.



Greiner brought suit against Prendergast to annul a judgment obtained against him by Prendergast, and he enjoined the execution of that judgment. The injunction was dissolved with \$27 damages, ten per cent interest on the judgment, and costs. Greiner took a suspensive appeal; and gave bond with Durell as his surety, conditioned as the bond is in this case. The judgment appealed from was affirmed; and on rule, Durell, the surety, was condemned to pay \$500, the amount of the appeal bond, "to be discharged on payment of \$271, with interest and costs, the amount of the original judgment in favor of Prendergast, against Greiner, together with the \$27 damages, and the ten per cent interest decreed on the dissolution of the injunction." On the appeal taken from this judgment, this court decided that Durell had bound himself for the payment of the \$27, ten per cent interest, and costs of the action of nullity, *"and nothing more."* To hold him to the payment of the original judgment would be to hold him beyond the terms of his bond, *which can not be done."* 3 An. 389.

Lewis, a slave, brought suit for his freedom against Cartwright, who claimed to be his owner; and he appealed suspensively from the judgment decreeing him to be a slave, and the property of Cartwright. The condition of the bond was identical with that in this case; and the judgment appealed from was affirmed. The slave was at large from 1841 until 1846, when he was arrested and delivered to Cartwright, from whom he afterward escaped. Suit was brought by Cartwright on the appeal bond against the sureties, to recover for the loss of the services of the slave from 1841 to 1846. This court said the obligation of the sureties was that the judgment which might be rendered on the appeal should be satisfied, *and nothing more.*

"Satisfaction of the judgment involved two things: 1. That the slave should surrender himself to his master as his slave. 2. That the costs of the suit should be paid. The judgment merely ascertained a question of property; it did not determine what damages the owner had incidentally incurred by the litigation carried on against him by his slave. \* \* \* \* \* The sureties in such an appeal, upon a bond expressed as the present bond, would be considered as satisfying their bond by delivering the slave and paying the costs." The judgment discharging the sureties was affirmed. 3 A. 685.

In the State vs. Judge of the Third District, 18 La. 444, the mortgagor arrested the sale, on opposition, under articles 739, 740 of the Code of Practice, without giving security. The injunction was dissolved, but the court ordered it to be reinstated on the mortgagor giving bond in the sum of \$13,500. He demanded a suspensive appeal, which was granted on condition of his giving bond in the sum of \$13,500; and he applied for a mandamus to compel the judge to grant him the appeal on

his giving bond to cover the costs. The case was one of first impression; and the court held that, although the mortgagor may be entitled to an injunction without giving bond, he can not take a suspensive appeal from the judgment dissolving that injunction without giving security as required by article 575 of the Code of Practice.

This decision is not reconcilable with the reasoning and decree in the subsequent case of the State vs. Judge of the First District, 19 La. 169, 171. Where an injunction is dissolved, without damages, a bond for costs only suffices for a suspensive appeal; *Malain vs. Judge of Third Judicial District Court*, 29 An. 794; and it logically follows that this rule is applicable as well to injunctions obtained without as to those granted with bond and security. The principle is that the judgment appealed from does not condemn the plaintiff to do any thing or to pay any thing; and he is, therefore, entitled to appeal on giving bond to cover the costs. This court well said in *Parham vs. Cobb*, 9 An. 426: "The term *suspensive appeal*, as used in the Code of Practice, has no meaning, except as applied to a judgment rendered against the defendant in a suit." Of course this is to be understood to apply to the party condemned; and the defendant in the judgment may be the plaintiff in injunction, or in a reconventional demand, etc. The false application of this term has misled the judicial tribunals of this State on more occasions than one, and notably in 18 La. 444. See the rule as stated in *Blanchin vs. Fashion*, 10 An. 345, and *Untereiner vs. Miller*, 29 An. 436, in accordance with *Parham vs. Cobb*, 9 An. 426.

In *State vs. Judge of the Seventh District Court*, 22 An. 35, it is said that a judgment *in rem* may be for a sum as specific as a personal judgment. "To suspend the execution of a judgment for a specific amount, whether it be an order of seizure and sale, or an ordinary judgment, the appeal bond must conform to article 575 of the Code of Practice;" and *Tournillon vs. Ratliff*, 20 An. 179, is relied upon as the authority for this assertion. But in that case the court decided nothing more than that a bond exceeding by one half the mortgage debt actually due sufficed to suspend the execution of the order of seizure and sale, although the whole mortgage debt was for a larger amount; and that the amount not due could not be taken into consideration. "Its payment was suspended by the terms agreed upon, without any bond." P. 180.

The case in 22 An. 35, therefore, is without support. If it be conceded that a judgment *in rem* may be for a sum as specific as a personal judgment, it certainly is not true that an order of seizure and sale, "Let executory process issue as prayed for, and according to law," is a judgment for any sum whatever. Who could know in advance what the mortgaged property would sell for?

In *Wood vs. Fulton*, 2 Harris & Gill (Md.), 75, which was an action

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Landry vs. Victor.

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on an appeal bond against the surety, on a decree foreclosing a mortgage, the court held that the decree appealed from was *in rem*, and that the measure of damages was the actual injury suffered by the appellee from the delay.

In the present case the obligation of the surety is dependent on two conditions; 1. That, on the appeal, the appellate court should render a judgment against the appellant. 2. That the appellant should fail to satisfy that judgment.

The appellate court could only review the matters passed upon by the district court. The district court merely ordered the mortgaged property to be seized and sold. The appellate court could only inquire whether sufficient authentic evidence had been presented to the district court to authorize that order. It might have found the evidence insufficient, and reversed the order; or it might have found part of the demand of the mortgagee not established by authentic evidence, and have affirmed the order deducting the amount not so established; or it might simply have affirmed the order appealed from. The court might have rendered a judgment against appellant for the costs, and, also, for damages for a frivolous appeal; and this would have been a judgment against the appellant for which the surety would have been bound by the terms of the bond. The court actually rendered no judgment against the appellant in this case, and it could not have rendered any judgment against him for the mortgage debt, because the proceeding in the district court was not against him, but was *in rem*, against his property. The appeal was not frivolous, but was so well founded that the appellate court reduced the demand of the mortgagee, the appellee, and condemned him to pay the costs of the appeal.

If the appellee was subjected to delay, it was by his own fault, because he demanded more than was legally due to him; and the mortgagor was entitled to seek relief, as he did, by appeal. The delay was not great; the appeal was taken in February, and the decree of the appellate court was rendered in December, 1874; and the mortgaged property was sold in January, 1875. Nearly half the price of the adjudication was consumed by the taxes, which had accumulated from 1870, and which primed the mortgage debt. The presumption is that the property sold for its full value; and it is not alleged in the rule, nor was it proven, that it would have brought more at any time between the date of the order, third February, 1874, and the date of the sale, thirtieth January, 1875.

As the obligation of the surety is to pay and satisfy such judgment as may be rendered against the appellant by the appellate court, on the appeal, he can not be held liable for damages for the delay caused to the mortgagee by the appeal; and it would be manifestly unjust in this case

to make him liable for any consequence of the delay, because it was by the fault of the mortgagee in demanding what he had no right to recover, that the appellant was compelled to seek the relief which he obtained by the appeal.

No case is cited, nor do we know of any, in which proceedings were taken to hold the surety liable on a bond given on appeal from the order of seizure and sale, prior to 1875. In *Whan vs. Irwin*, 27 An. 706, the mortgaged property had been sold, and a balance of the mortgage debt remained unpaid. A rule was taken on the surety in the appeal bond; and our predecessors decided without dissent that as there was no personal judgment against the appellant, the mortgagor, no execution could issue against him, and the surety could not be held liable. A rehearing was granted; and the court, by a bare majority, three to two, decided that, after exhausting the mortgaged property, the mortgagor might proceed at once against the surety in the appeal bond. In support of this the cases in 20 An. 179, and 22 An. 35, are cited, both of which relate exclusively to the amount of the bond to be given on an appeal by the mortgagor from the order of seizure and sale; and neither of them refers in any manner to the extent of the liability of the surety.

*Whan vs. Irwin* ignores the jurisprudence of half a century, and the express terms of the Code of Practice, that this *ex-parte* order of court is not a judgment, in the true and legal sense of the term; and it can not be accepted as a correct statement of the law. In the subsequent case of *Gaines vs. White*, 28 An. 532, there was a personal judgment for a large sum with recognition of the mortgagee's rights; and that judgment was appealed from.

Neither the mortgagor nor his surety guaranteed the sufficiency of the mortgaged property to pay the mortgage debt, as the Supreme Court of Maryland well said in 2 *Harris & Gill*, 75. The specific obligation was to satisfy such judgment as might be rendered against the appellant on the appeal. No judgment was rendered against him. The order of seizure and sale, to the extent that it can be called a judgment, is a judgment purely *in rem*; and the decree of the Supreme Court simply affirmed that order. If it can be said that the appellant and the surety bound themselves that that order or judgment should be satisfied, it was satisfied by the sale of the mortgaged property. When the mortgaged property had been sold, the order of seizure and sale was satisfied; and the proceeding in that suit was at an end. To say that the surety bound himself that the entire mortgage debt should be paid, is to make a contract for him to which he never consented. The order of seizure and sale did not condemn the mortgagor to pay any sum, much less to pay the mortgage debt. It merely ordered the mortgaged property to be sold, whatever it might yield; and the affirmance of that

order did not condemn the mortgagor to pay any thing. The proof of this is that no proceeding could be taken on the suit *via executiva* to recover of the mortgagor the balance remaining unpaid after the sale of the mortgaged property.

It is elementary that the obligation of the surety can not be extended beyond that of the principal. *Gilbert vs. Meriam*, 2 An. 162; *R. C. C.* 3087. The surety in this case was not bound except by the appeal bond; and there is nothing in that bond which binds the principal to pay the mortgage debt. By what process of reasoning can it be shown that the surety, binding himself specifically that a judgment to be rendered shall be satisfied, is liable for another and a wholly different judgment, rendered in another and a wholly different suit? On the affirmance by the appellate court of the order of seizure and sale, neither before nor after the mortgaged property has been sold and exhausted can any writ issue against the mortgagor on that order. How can his surety be held under the more onerous condition that, on sale, judgment and execution may be obtained against him to which the principal is not liable?

In *Cartwright's case*, 3 An., the satisfaction of the judgment appealed from was the delivery of the property to the owner; that is, the performance of the decree. In this case, the satisfaction of the order of seizure and sale was the sale of the mortgaged property. In *Wilson vs. Churchman*, the liability of the defendant was fixed by the judgment appealed from; and the cause was remanded only to ascertain the precise amount of that liability. But when that liability was ascertained the judgment was not that rendered by the appellate court on the appeal; and the sureties were not bound, because they were liable only for such judgment as might be rendered by the appellate court on the appeal, not for a judgment to be rendered in subsequent proceedings in another court. In this case it can not be pretended that the surety on the appeal bond was liable for the entire mortgage debt. It was necessary first to sell the mortgaged property; and a new suit was then brought to enforce the personal liability for the balance.

The proceeding *via executiva* related solely to the liability of the mortgaged property, and in no way affected the personal liability of the mortgagor. The surety undertook to satisfy such judgment as might be rendered against the mortgagor in that suit, which could have been only for costs and damages; and he did not in any manner undertake to be liable for another judgment, in another suit against the mortgagor.

It is manifest that the idea of the liability of the surety in such a case, for the balance not satisfied by the sale of the mortgaged property, grew out of the demonstrated error in 18 La. in fixing the amount of an appeal bond on the dissolution of an injunction; and this was followed by the demonstrated error in 22 An. in calling an order of seizure and

sale a judgment for a specific sum, and requiring an appeal bond in such case to be in accordance with art. 575 of the Code of Practice. It seems to me contrary to right and justice that a surety in such a bond should be held as guarantor of the sufficiency of the mortgaged property; and that the mortgagee, after he has obtained the full benefit of the security which he accepted in the contract of mortgage, should be allowed to recover of the surety in the appeal bond, as if he had been guarantor of the sufficiency of the property, and surety, originally, for the debt secured by the mortgage.

There is proof on the record tending to show that plaintiff paid part of the city taxes at fifty cents on the dollar, which are deducted in full from the price of the adjudication. If the surety could be held liable, he ought to have the benefit of this discount; and the case should be remanded to ascertain the amount.

The proceeding by attachment differs from that by executory process in many particulars; and the Code of Practice, art. 732, declares that they are subject to different rules, and must not be confounded. In a suit by attachment the proceeding is, in form, *in personam*. An action is brought to recover a debt, a specific, fixed amount; and the property of the debtor is attached for the purpose of bringing him into court; and to secure the payment of the judgment that may be rendered. If the debtor is absent and is not cited, a curator *ad hoc* or advocate is appointed to represent him, and is cited in his stead. A judgment is rendered against the defendant, with lien and privilege on the property attached. That judgment is for a specific sum; and if the curator or the defendant should appeal suspensively, the bond would be fixed in accordance with art. 575 of the C. P.; and the surety would know and understand that he was bound for the debt if it was not made out of the debtor or his property, in the event of the affirmation of the judgment by the appellate court. The form of the proceeding is *in personam*; but where the defendant is not cited, and does not make personal appearance, the proceeding is *in rem*, in the sense that it concludes the defendant only with respect to the property attached; and no other property of the debtor could be seized and sold under that judgment.

It will be time enough when the case arises to inquire what would be the liability of the surety in an appeal bond in an attachment suit where the defendant has not been cited and has not appeared personally and the value of the property attached is less than the amount of the judgment. Reference has been made to this proceeding now and this digression made only because it has been suggested that the proceeding by attachment and by seizure and sale are subject to the same rules. The Code of Practice declares that they are not; and, it may be

added, there is not much probability that a curator *ad hoc* would be able to give the bond for a suspensive appeal in an attachment suit without the consent and assistance of the defendant, and such action on his part as would bind him personally by such judgment as might be rendered on the appeal by the appellate court, by which his surety would also be bound.

It may be that the proceeding by seizure and sale interrupts prescription; but the argument and decision to the contrary in *Harrod vs. Voorhies* has never been met or answered. It may be that where the mortgagor, having obtained an injunction on opposition, can appeal from the judgment dissolving that injunction only by giving bond for an amount exceeding by one half the mortgage debt, as decided in 18 La. 444; though this would be in violation of the general rule that plaintiff in injunction, and the party who is not condemned to do any thing, or to pay any thing, may appeal on giving bond for the costs only; and it may be, as asserted in 22 An. 35, that to appeal suspensively from an order of seizure and sale, the mortgagor must give bond for one half over the amount of the mortgage debt, contrary to all the analogies of the law in kindred cases. It would not thence follow that the surety in such a bond was liable for the mortgage debt, or for the amount of a judgment rendered in another suit, for the remainder not paid by the sale of the mortgaged property. His obligation is specific to pay and satisfy such judgment as may be rendered "against the appellant," on the appeal; and it can not be extended beyond the express terms of the bond. A judgment for the remainder, a judgment in another suit, is not the judgment appealed from, nor is it the judgment rendered against the appellant by the appellate court on the appeal. Until such a judgment has been rendered and has not been satisfied the surety is not in default: his conditional obligation has not become absolute, and he is not liable.

*Whan vs. Irvin* is the only case of which I have any knowledge in which the surety in an appeal bond has been held for a judgment rendered by another court than that of the appeal; and in another and wholly different proceeding. In my judgment that decision and the one now rendered in this case impose upon the surety an obligation to which he has never assented. The contract of suretyship is *strictissima juris*: Whenever resort is had to the surety, he may well ask: "Is it so nominated in the bond?" And if it is not, he may truly say: "*Non in hæc fœdera veni.*" Instead of construing the obligation of the surety strictly, *Whan vs. Irvin* construed it liberally against the surety, and in favor of the obligee. In *Whan vs. Irvin*, a contract was made for the surety and enforced against him, instead of the contract which he actually assented to and made.

*Wilson vs. Churchman*, 6 An., was a well considered case, by a court

which we all remember with pride as one of the ablest that has ever graced the Bench. That decision commends itself to my judgment and approval, and I am not prepared to overrule it.

Dissenting, as it is my misfortune to do in this case, from all my brethren, due respect for them and myself has compelled me to state at large, as I have done, the reason by which I am controlled.

No. 7013.

MRS. A. R. RICHARDSON VS. MOSES MANN.

Where the pledgee of a mortgage note, in whose hands it has been placed to secure a debt due him by the pledgor, sells the property mortgaged to secure the note for a sum less than the amount of the note, and immediately resells it for a larger sum than that of the note, he becomes liable to the pledgor, not for the price at which the property was resold, but merely for the amount of the note.

**A** PPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Yoist, J.*

*Kennard, Howe & Prentiss* and *W. W. Leake* for plaintiff and appellee.

*Wickliffe & Fisher* for defendant and appellant.

The opinion of the court was delivered on the original hearing by *MARR, J.*, and on the rehearing by *SPENCER, J.*

*MARR, J.* Mrs. Richardson pledged to Mann, Fischer & Co., as collateral, two notes secured by mortgage on the "Island Plantation." On the 4th February, 1875, it was agreed between her and Moses Mann, of Mann, Fischer & Co., then in liquidation, that Mann should "proceed in a summary manner, by the 25th January, 1876, to collect the notes held as collateral, or, if he should not do so, he obligates himself to pay to Mrs. Richardson the difference between the sum total of her indebtedness to Mann, Fischer & Co. and to Mann individually and the notes held as collateral, it being optional with Mann to proceed to the summary collection before the 25th January, 1876, should he so desire."

On the 24th January, 1876, Mann, Fischer & Co. obtained an order of seizure and sale on the mortgage notes; but their attorney apprehended that the evidence on which that order was granted was not sufficient, because he had offered a copy of a copy of the mortgage; and, as soon as he procured from New Orleans a properly authenticated copy of the original, he submitted that, with the other authentic evidence, and the judge ran his pen through the figure "24," in the order, and wrote in the line above "thirty-first."

The sale-day in the parish of West Feliciana was the first Saturday of each month. The first Saturday in February was the fifth day of the



month; and, of course, there was not time to advertise for that day: the first Saturday in March was the fourth day of that month, which was a legal holiday, a *dies non*, by express statute: so that the sale could not have been made on that day. Act of 1874, p. 64. The sale was made on the first Saturday, which was the first day of April.

This suit was brought on the 24th of February, 1876, to recover of Mann the amount of the two mortgage notes, \$5000, with eight per cent interest from January 25, 1874, less sundry credits set forth in the petition, on the ground that Mann had "failed to proceed to the summary collection of said mortgage notes on or before the 25th January, 1876, according to said contract, and refuses to pay petitioner the balance of her notes as he agreed and obligated himself to do, though amicably requested, and having been put in default."

The answer sets out the facts, the obtaining of the order of seizure and sale on the 24th January, that no legal sale could have been made prior to the first Saturday in April, when it was made: that plaintiff suffered no damage or injury from the fact that the suit was instituted on the 31st instead of the 25th January; that defendant's counsel had doubt as to the sufficiency of the evidence on which the order of 24th January was granted, and for that reason sent to New Orleans for additional evidence, on which the date of the order was changed to 31st January; that the sale could not have taken place earlier than the 1st April on an order obtained at any time in January; and that he has carried out strictly the spirit and intent of the contract.

In November an amended petition was filed in which it was charged that on the 1st April the property was adjudicated to Moses Mann and others for \$8200; that at the sale Mann, Fischer and others, and Vincent D. Walsh were bidding for the property, when Mann persuaded and influenced Walsh not to bid, and as soon as the property was adjudicated to Mann and others they sold it, before leaving the place, under their agreement, to Walsh for \$10,000.

That the illegal acts of Mann and others prevented fair competition and sale as contemplated by law, through which Mann expected to defraud petitioner of one half the difference between his purchase, \$8200, and the sale to Walsh for \$10,000, amounting to \$900 05.

The prayer is for judgment for the entire amount, as set forth in the original petition.

Defendant answered by denial of each and every allegation in the amended petition contained. The judgment was in favor of plaintiff's transferees, McGehee, Snowden & Viclet, for \$5000, with interest, subject to sundry credits, as prayed for in the original petition; and defendant appealed. Plaintiff, in answer, prays for damages for a frivolous appeal.

We agree with the district judge that Mann complied with his contract to proceed in a summary manner by the 25th January, 1876. He had the option to proceed or not before that time; he obligated himself to proceed by that time. He actually commenced the proceeding, by obtaining the judge's order on the 24th January. If he had prosecuted the sale under that order, with all possible dispatch, it could not have been made before the first Saturday in April.

It appears from the testimony of Walsh that August Fischer, representing Mann, Fischer & Co., and Willis W. Forrester, who held one of the mortgage notes, concurrent with those pledged by Mrs. Richardson to Mann, Fischer & Co., were bidding on the property against Walsh. Walsh had made one or more bids, and had bid more than he intended when he left home. He asked the sheriff to suspend until he could have a talk with Fischer. Does not remember whether or not Mann was present at this conversation. He did not bid again on the property. Did not bid on the machinery, which was sold separately. After the sale, and before leaving the place, "I was induced, by the advice of Gov. Wickliffe, to buy the property. The inducements that persuaded me to purchase was the deferred payments, enabling me to meet them with the crops raised on the place. I purchased the property at \$10,000, one half cash, and balance in one and two years."

On cross-examination he says he considers \$10,000 for the place, including the machinery, on the terms, half cash, balance in one and two years, a more reasonable price than his highest cash bid, which was between \$6500 and \$7000, for the place alone, without the machinery.

"Neither Moses Mann, nor August Fischer, nor Willis Forrester, nor Max Fischer, nor any other person persuaded or induced witness to cease bidding on the place. Witness ceased bidding because he thought that Mr. August Fischer would give more for the property than witness would. Witness came to that conclusion from the conversation he had with Mr. Fischer. \* \* \* \* \*

"Had no understanding with Mann, Max and August Fischer and Forrester in regard to bidding on the Island plantation, except that he told August Fischer that he would not bid any more than he had already bid; that he had already bid more than he expected, when he found out that the machinery would be sold separately."

The testimony fails to show any illegal act, any thing that was in any respect improper on the part of Walsh, or the other parties bidding on the property. It is evident that he was influenced mainly by the advice of Gov. Wickliffe and Louis Sterling, old friends of his, as he states, to make the purchase; and he considered the terms at which he purchased better than his highest bid.

The district judge makes no reference in his reasons for judgment

## Richardson vs. Mann.

to the alleged illegal acts of Mann, with intent to defraud Mrs. Richardson; nor do we think it necessary to say more than that it is without support in the testimony adduced. The decision in favor of plaintiff is upon the sole ground that, in the transaction with Walsh, "Mann was acting as the agent of Mrs. Richardson, and she is entitled to the benefit of said sale at \$10,000."

The legal title to the two notes pledged to Mann, Fischer & Co. was in them. They had the option to allow Mrs. Richardson their face value and interest, or to proceed on them by the 25th January, 1876. They elected to proceed, and they commenced the proceeding on the 24th of January. They were no more the agents of Mrs. Richardson, in provoking the sale of the mortgaged property, than they were of Willis Forrester, who held one of the series of notes secured by the same mortgage. Their object was to collect the debt due them by Mrs. Richardson; and their only obligation to her was to collect and give her the benefit of her share and portion of the proceeds of the sale. If the amount thus realized on the two notes should exceed the amount of her indebtedness, for which they were pledged, she would be entitled to the excess. They did not buy the property as agents for Mrs. Richardson, nor did they sell it to Walsh as her agents. They purchased in their own right, as the highest bidders; and their obligation was to account for the proceeds. Their bill was \$8200. The costs and taxes to be deducted were \$935 70, leaving for distribution \$7264 30. Out of this the sheriff retained, by order of court, \$500, to answer the demands of Rudman and Wagner, who claimed privileges on the machinery and implements, leaving for actual distribution to the two mortgage creditors \$6764 30.

The amount of Mrs. Richardson's two notes was - - \$5866 67

And the amount due Forrester was - - - - - 2933 33

Total mortgage debt - - - - - \$8800 00

If the \$500 retained by the sheriff should come into this distribution, Mrs. Richardson's portion would be just double that of Forrester, \$4912 87. Or, if the \$500 be deducted, her share would be \$4509 54.

The amount due by Mrs. Richardson to Mann, Fischer & Co. up to the date of the sale was \$4941 29. If her share of the proceeds be fixed at \$4912 87, the balance against her would be \$142. If it be fixed at \$4509 54, she would owe Mann, Fischer & Co. \$331 75. In either case, Mrs. Richardson has no just claim or cause of action against defendant; and she had none at the time the suit was brought.

The judgment of the district court is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of plaintiff be rejected, and her suit be dismissed with costs in this court and in the district court.

## ON REHEARING.

SPENCER, J. The questions presented and to be determined by us on this rehearing we will consider *seriatim*.

First—Is the pledgee of a note the agent and mandatary of the owner, and in case he buys property mortgaged to secure the note for a less sum than the amount of the note, and immediately resells it for a greater sum than the note, what is the measure of his responsibility to the owner? Is he bound to account only for the price at which he purchases; or at the price at which he sells; or is he liable only for the amount of the note?

Although for the purposes of collection the pledgee is considered to have the legal title of the note pledged, still he is not really the owner of it. Art. 3166 C. C. declares that the debtor "remains proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it." This is made manifest also by the undoubted rule that when there is no fault or negligence in the pledgee the loss of the pledge, or deterioration of its value, by insolvency, etc., must be borne by the pledgor. 1 An. 344.

The obligations of a pledgee are in substance very similar to those of mandataries and agents. In 17 Barbour, 492, the Supreme Court of New York say that "a creditor holds collateral securities as the agent and trustee of his debtor." In *Moses vs. Murgatroyd*, 1 John. Ch. 119, Chancellor Kent said: "These collateral securities are in the nature of trusts, created for the better protection of the debt." In 1 An. 344, our own court assimilate the responsibilities of pledgees of notes to those of agents, and a similar doctrine is held in "*King vs. Harman*," 6 La. 607.

We think, therefore, that Mann, in the enforcement and collection of the mortgage notes placed in his hands as collaterals, was the agent or trustee of Mrs. Richardson, and is not permitted to speculate, to her prejudice, upon the thing pledged.

Mr. Story on "Agency," sec. 207, says: "Indeed, this doctrine is so firmly established upon principles of public policy that no agent will be permitted to take \* \* any profits *incidentally obtained* in the execution of his duty, even if it be sanctioned by usage. Such a usage has been severely stigmatized as a usage of fraud and plunder."

Perry on Trusts, § 427, says: "Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. At the same time the beneficiaries of the trust may be *women* or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees

from using their position and influence for their own gain, and to prevent them from hazarding the trust property upon what they may think to be profitable speculations on the other, they are not allowed to make any profit from their office. They can not use the trust property, nor their relations to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule as between trustee and *cestui que trust*. \* \* \* \*

"A trustee, executor, or assignee can not buy up a debt or incumbrance to which the trust estate is liable for less than is actually due thereon and make a profit to himself: but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestui que trust* shall have *all the advantages of such purchase*. \* \* \*

"So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside or to *claim all the benefits and profits of the sale for himself*. \* \* \*

"By this rule, trustees may be liable to great losses, while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust fund upon the chances of trade and speculation. If a trustee charge a bonus in his account for his skill and services in conducting the business of the trust, it will be set aside. \* \* \*

"All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation. \* \* \*

"Agents, guardians, directors of corporations, officers of municipal corporations, and *all other persons clothed with a fiduciary character*, are subject to this rule."

In his work on Bailments Mr. Story says, § 343:

"Another duty of the pawnee at the common law is to render a due account of all the income, profits, and advantages derived by him from the pledge in all cases where such an account is within the scope of the bailment. If, for instance, the pawn is a slave, the profits of his labor are to be accounted for. If the pawn consists of cows, horses, or other cattle, the profits of their labor are also to be accounted for, if within the contemplation of the parties. The Roman and foreign law seem, in all cases of this sort, to imply an obligation to account, from the very nature of such a pledge. In rendering an account of the profits, the pawnee is at liberty to charge all the necessary costs and expenses to which he has been put, and to deduct them from the income or profits.

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Richardson vs. Mann.

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If he has sold the pledge he is bound to account for the proceeds, and to pay over to the pawner the surplus beyond his debt or other demand, and the necessary expenses and charges. Pothier thinks that the duty of the pawnee goes further; and that he is bound to account for all the profits and income which he might have received from the pledge but for his own negligence."

See, also, *Gibson vs. Hunter*, 14 La. 124.

But in the case before us the total mortgage debt bearing on the property amounted to only \$8800, of which \$5866 67 was held by Mrs. Richardson, and \$2933 33 by Willis Forrester. The property was bought in by four persons jointly, and, so far as appears, equally, to wit: Moses Mann, Max Fischer, August Fischer, and Willis Forrester; and these four made a joint deed without assignation of parts to Walsh for ten thousand dollars, one half cash, and the balance at one and two years with eight per cent interest from date, and attorney's fees, and secured by mortgage and vendor's lien. We think this equivalent to a cash sale at \$10,000. But we see no reason why we should allow Mrs. Richardson more than the amount of her notes. We do not think the agent's responsibility should go beyond that. If he realizes the full amount of the notes, there is no speculation at her expense or to her loss. We think that under the circumstances of this case, when the property was bought in for \$8200 and on same day and at same place resold for ten thousand dollars cash, or its equivalent, the agent should not be permitted to profit by the resale, except to the extent that there is excess over the amount due the pledger. But we can not require the agent to pay more than he realized. As we have seen, Mann was only one of four purchasers, and realized therefore by the resale only one fourth of \$1800 as profit—say \$450. This suit is against Mann *only*, and we can not hold him responsible for the profits made by his copurchasers, who are no parties to this suit, and, for aught that appears, in nowise the agents or trustees of Mrs. Richardson, or in any wise accountable to her for any profits realized by them. She declares upon her contract *with Mann only*, of date February 4, 1875. It is that which she seeks to enforce in her original petition; while in the amended petition she simply alleges a conspiracy to prevent bidding at the sale, and consequent injury. She does not ask any where specifically the relief sought on this rehearing; but as the evidence showing the relations between herself and Mann is before us without objection, and there is a prayer for a judgment of \$1500 and "for general relief," we think we can allow her a judgment for the amount realized by Mann as profits on resale. As we have seen, Mann realized a profit of \$450. Giving Mrs. Richardson the benefit of the \$500 retained by the sheriff, she would still owe defendant \$1 42 after crediting her with her *pro rata* of the \$8200, less costs.

## Richardson vs. Mann.

Her <i>pro rata</i> was, after deducting costs, - - -	\$1842 87
Her debt to defendant was - - - - -	4844 29

Leaving balance due by her - - - - -	\$ 1 42
Which being deducted from - - - - -	450 00

Leaves due by Mann - - - - -	\$ 448 58
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But should the \$500 retained by the sheriff on oppositions or any part thereof be decreed to go to the claimants (opponents), then her *pro rata*, to wit, two thirds of these \$500, or of such part thereof as may be decreed to said opponents, must be deducted from the above sum of \$448 58.

It is therefore ordered and decreed that our former decree be set aside, and it is now ordered that plaintiff, Mrs. Richardson, (for use of McGehee, Snowden & Violet, subrogees,) do recover of Moses Mann the sum of \$448 58, with legal interest from April 3, 1876, till paid, subject to a credit of same date for two thirds of such sum as shall be awarded out of the \$500 retained as aforesaid to said opponents.

It is further ordered that this cause be remanded, for the purpose solely of ascertaining the amount of said credit, and that this judgment be not executed so far as it would be affected by said credit until the same is ascertained.

It is further ordered that plaintiff and appellee pay costs of this appeal, and defendant those of the court below.

No. 6530.

## AUGUSTUS F. HICKMAN VS. GUSTAVE J. FRERET ET AL.

In order to make a valid appraisement of the undivided interest of an heir in a succession which has been seized under a *fi. fa.*, it is proper to appraise, not each separate effect of the succession, and then estimate the value of his share of such effect, but to appraise his interest as a single, undivided thing, and estimate its value, after deducting the debts and charges of the succession.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Campbell, J.*

*Julien A. Seghers* for plaintiff and appellant.

*McEnery, Ellis & Ellis* for defendants and appellee.

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by SPENCER, J.

EGAN, J. The only facts material to the issues in this proceeding are the following: The plaintiff, a judgment creditor of the defendants, sued out a writ of *fiери facias* under which the sheriff seized and adver-

tised for sale—to use the language of his return and of the notice of seizure and advertisement, all of which are accordant—“All the right, title, and interest of Gustave Joseph Freret and William Peter Freret as heirs at law of the succession of their late father, James P. Freret; *their said interest in said succession consisting of one undivided twenty-sixth part to each of them in and to the property hereinafter described, to wit:*” then follows the specific description in detail of three certain portions of ground in the city of New Orleans, numbered from one to three; fourth, a certain mortgage note; and, fifth, sundry bills receivable. The property was separately appraised; No. 1 at \$1500; No. 2 at \$1800; No. 3 at \$8000; No. 4 at \$250, and No. 5 at \$25 cash, making the appraisement of the undivided interest of the defendants in the whole property thus seized, appraised, and advertised for sale amount to the sum of \$3175. At the sale the entire interest of both defendants, as thus described, was bid in by J. H. Lagroue, for the sum of \$2125, a few dollars more than two thirds of the appraisement. Lagroue not having complied with the terms of sale, and the sheriff not having completed the adjudication by making title, the present rule was taken by the plaintiff to compel them to do so. The mode of seizure adopted was, to say the least of it, very unusual. Although the sheriff professed to seize all the right, title, and interest of the heirs in the succession, he describes that interest in all the proceedings, as we have seen, to be one undivided twenty-sixth part to each of them, in and to specific property; and thereupon the sheriff proceeded to have each piece of property, and the interest of the defendant heirs in each piece of property, separately appraised, just as though they held it in indivision by any other right or title, and not merely as succession rights subject to the settlement of the succession. It is not true to say of an heir that he is interested as such in any proportion in *any or all of the property of the succession*. If he be heir, he is interested in proportion to the number of heirs in the succession as an entirety, subject to its settlement and the payment of its debts. It is that interest, and that only, which as an incorporeal right is allowed to be seized and sold under article 647 of the Code of Practice. See *Noble vs. Nettles*, 3 R. 152; *Mayo vs. Stroud*, 12 R. 105; *Diamond vs. Courtney*, 12 Annual, 251. In the present case the appraisement which regulated the sale was not that of the right of the heirs, but of specific interests in specific property, appraised for the purposes of the sheriff's sale separately, and as though the interest of these heirs were as well ascertained and as definitely fixed, with regard to each piece of property appraised, as if it were held by them as joint owners with other co-proprietors. While it is as necessary, then, to appraise for the purposes of forced sale the incorporeal thing, the right or interest of an heir in a succession, and while for that purpose it is proper to



take into account the property of which the succession consists, it is not that property or any specific or proportionate interest in it which is subject to seizure and to sale, and consequently to appraisement with that view ; but it is simply the right or interest of the heir in the entirety, the succession, and subject to its settlement and the payment of its debts and charges, which should be appraised, as it alone can be seized or sold. This was not done in the present case, and without it the sale was not lawful, and can not be enforced ; practically, the purchaser was made by this appraisement to pay for what he did not get, and might never get. That it was not the right of the heir which was appraised, is manifest, as in order to do that it was necessary to take into account not merely the value of the succession property, but also the amount of the debts and charges to which it was subject.

The court below discharged the rule at the cost of the plaintiff.

The judgment is correct, and is affirmed.

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ON REHEARING.

SPENCER, J. The right of an heir in a succession is an incorporeal thing. It is an entity, a unit. It does not consist in specific interests in specific things ; for when determined and ascertained by the liquidation and settlement of the succession, such things may form or constitute no part of what the right embraces. It is not true to say that the heir owns any particular part of any particular property composing the succession. You can not seize or sell his interest in any specific thing belonging to the succession, and, therefore, you can not appraise specific and particular things in order to a sale of his hereditary right. His right of succession is in some sort indivisible. No one can seize a fraction of it. It is a single right and not an aggregation of many rights. It must be seized, appraised, and sold as a unit. For the purpose of approximating its value, the appraisers would of necessity take into consideration the value of the active mass of the succession, and, also, the passives, or debts and obligations thereof. They would thus ascertain the probable net value of the succession *in globo*, and fix the value of the heir's *succession right* by taking the aliquot part represented by him as heir.

As stated in our former opinion, the appraisement in this case seems to have been made by separately valuing the heir's interest in each of several pieces of property said to compose the succession. It is true that the appraisers then put the value of the "total undivided interest" of the defendant heirs at a round sum of \$3175. Perhaps it is *the mode* of reaching the conclusion as to value which is irregular, rather than *the conclusion itself*, since there is a *round sum* declared by the appraisers to be the value of the heir's right under seizure.

But if the seizure and appraisement be regular, under the mortgage

certificate there could be no adjudication at the price said to have been bid by Lagroue, \$2125. The recorder of mortgages certifies as existing *on the property seized* the following mortgages "*in the names of Gustave J. Freret and William P. Freret,*" to wit: "The mortgage in favor of Theo. Lercom, act of O. de Armas, notary, dated October 26, 1870, to secure the sum of \$6000, interests and costs, etc., recorded October 28, 1870." Then another mortgage before Cuvillier, notary, in favor of Chas. Lafitte, for \$8500, recorded May 4, 1872. There are, also, other antecedent mortgages and privileges certified to exist. These mortgages are certified as having been granted *not by the ancestor, as suggested by plaintiff's counsel, but by the heirs, G. J. and W. P. Freret.*

Plaintiff's suit, in which he attached the property in question, was not commenced till November, 1875, and his judgment and judicial mortgage were only registered November 29, 1875.

It appears, therefore, that there were operating and uncanceled upon this property *two antecedent special mortgages granted by the seized debtors*, and amounting to \$14,500 principal. No adjudication could be made on a bid less than the amount of these prior special mortgages. C. P.

It is therefore ordered that our former decree remain undisturbed,

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CONCURRING OPINION.

EGAN, J. I adhere to the views expressed in the original opinion in this case. I do not regard the manner of seizure and of appraisement adopted in this case as merely irregular. In my opinion, they were both illegal, for the reasons stated in the original opinion, and under the facts therein stated, which are copied from the record. I concur in so much of the opinion now read as holds the sale in question bad, for the additional reason stated, that, even assuming the validity of the seizure, the price bid was less than the special mortgages resting upon the property. In preparing the first draft of the original opinion I had taken that view, also. After consultation it was omitted as unnecessary. I still adhere to that view of the case. The sheriff states that he seized and offered for sale the entire interest of the heirs in the succession, *which interest* he states is one undivided twenty-sixth interest to each of them (not in the succession) but in each of the following pieces of property—describing them as stated in the original opinion. This, it is admitted, was not true—an admission which is conclusive of the question that the heirs had not and could not have any such interest in the particular property which the sheriff professed to seize, appraise, and sell.

I concur in the decree affirming our former decree.

Nos. 6957 and 7052.

## SUCCESSION OF J. C. PATRICK. OPPOSITION OF CARROLL, EXECUTRIX.

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The law of this State authorizing the revival of judgments was not intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but was only intended to prevent the prescription of judgment debts, and continue them in force for ten years from the date of the judgment of revival. The prescription of a debt evidenced by a judgment, can be interrupted in the same modes as the prescription of debts evidenced in any other way, except, that the acknowledgment of the judgment debt by the debtor must be *in writing*.

The written acknowledgment, or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription.

The special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests by preference over the expenses and charges of the administration, only when there are other funds of the succession out of which such expenses may be paid.

**A** PPEAL from the Parish Court of West Baton Rouge. *Hyams, J.*

*Barrow & Pope* for appellee.

*Thos. J. Semmes, Favrot & Lamon, and Chas. Carroll* for opponent and appellant.

The opinion of the court was delivered by

EGAN, J. This case comes before us on two appeals; one taken by the opponent, and the other by the executor of the succession. The principal question grows out of the filing in this court of a plea of prescription of ten years against the judgment evidencing the claim of opponent. The judgment was rendered on the fourth of *January*, 1868, and has never been revived under the statute. The plea of prescription was filed on the sixteenth of *February*, 1878, more than ten years after the rendition of judgment.

Two questions confront us at once under this state of facts. First: Do the general rules laid down in the Civil Code for the *interruption* of prescription of debts apply to judgments as well as to other forms of obligation?

Second: If they are thus applicable, has prescription been interrupted in the present case, and, if so, how? Prior to the act of 1853 our law provided no period for the prescription of judgments; debts thus evidenced and decreed to exist in the most solemn form were so highly favored and considered of so high dignity and truth that they were imprescriptible. Then, for the first time, it was provided that "all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments;" thus fixing their prescription at the longest time

known to our law for the prescription of personal actions. It was, however, at the same time provided that *any party interested* (not merely the judgment creditor) might have the same (judgment) *revived at any time before it is prescribed* by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived: and that "*any judgment revived as above provided shall continue in full force for ten years from the date of the order of court reviving the same, and any judgment may be revived as often as the party or parties interested may desire.*" These provisions are re-enacted in terms in the Revised Civil Code, article 3547, under the general head of: "Of the prescription which operates a release from debt;" and under the particular head (which also embraces certain other particular actions and personal actions in general not otherwise provided for): "Of the prescription of ten years." This statute, passed originally in 1853, continued in the revision of 1855, 1856, and again in the present Revised Civil Code of 1870, is now, as we have seen, incorporated with and placed by the legislator upon the same general footing as other prescriptions operating a release from debt, and under the general head of "Prescription," in the Code. As an original question, then, it would hardly have occurred to any one to distinguish the prescription of judgments from the prescription of debts otherwise evidenced, except as the time of acquiring prescription when specially provided, and except, also, as to the higher privilege accorded to judgment creditors of *preventing prescription* altogether by the action of revival. We may here remark of this peculiar statutory action that it is not to be confounded with the *interruption* of prescription, which when the statute is complied with is not *interrupted* in the sense and meaning of the law, but is considered as *having never been*, as being altogether *prevented* by the action for revival. This is manifest not only from the fact that this prevention of prescription is provided for by the proviso of the very act which creates it under other conditions, but because by the terms of the law itself, unlike the interruption of prescription, the time during which the judgment shall continue in force is counted not from the date of service of citation, but "from the date of the order of court reviving the judgment." It is, however, argued that because the law provides a means for the *revival* of judgments, and for thus continuing them in force, this action of revival is the only means of avoiding the effect of the lapse of time fixed in the law for their prescription! In other words, that debts thus ascertained and decreed to be due in the most solemn form known to the law, to which the highest dignity is attached, and containing one, the existence and exigibility of which is closed by the rendition of the judgment, which

## Succession of Patrick.

theretofore stood as a perpetual public evidence in favor of the creditor and against the debtor, were placed and intended to be placed by the passage of the statute providing for the first time for their prescription "*in duriori casu*" than any and all other debts, of however little dignity, and however evidenced! Is such a legislative intention to be lightly assumed? We say "*in duriori casu*," because while the avoidance or interruption of prescription *by suit against the debtor* is always open to the creditor *whose debt is not merged in judgment*, he is also entitled to the benefit of all the means otherwise provided in the law for the avoidance or interruption of prescription, while if the argument now urged be well founded the judgment creditor alone is not permitted to profit by an acknowledgment of his debtor voluntarily given, or by any of the other means of interruption known to the law and applicable to other creditors and debts without distinction. We should be very slow to arrive at such a conclusion unless it is clear that such was the legislative intention. What, then, it may be asked, was the object of the Legislature in providing in the same act for the revival of judgments by citation to the debtor and another solemn adjudication by the same court of the continued existence and exigibility of the judgment debt? This, we think, is easily answered. But for the proviso of the act the judgment creditor who had once resorted to citation to his debtor and thus exhausted his legal remedy in the courts; who having once sued and attained all the ends and objects of suit would not again have been permitted to summon his debtor before a court of justice on account of the debt would have been left entirely at the mercy of his debtor who might not choose to give any voluntary acknowledgment of the debt and who not being liable to citation by his creditor, as in case of ordinary debts or creditors, had nothing to do but sit still during the ten years and his judgment creditor would have thus been completely in his power notwithstanding the high dignity and formal judicial ascertainment of his debt. Hence it was that the same statute which made judgments prescriptible in ten years at the same time gave the creditor or other parties interested the statutory action for *the revival and continuing in force of the judgment*—without reference to any act of the debtor. Had the statute not given him a direct action in some form, he would have had none. The Legislature, which in those days was composed in part of lawyers of eminent ability, it may be well assumed saw this, and while applying prescription to judgments at the same time and by the same act provided this peculiar action of revival, which this court has repeatedly held to be so exceptional in its character that the grounds or evidence upon which the judgment is based can not be inquired into, and that the only issues pertinent are: Is there in fact a valid subsisting judgment, rendered by a competent court, and is it still exigible, or has

It been extinguished by payment or in some other lawful mode? It is then both in the scope of inquiry and in its effects wholly unlike the ordinary action upon debts and claims not in judgment, and neither by its terms nor any fair construction was intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but, as we have said, was intended altogether to prevent the prescription of debts evidenced in the solemn form of judgments and to "*continue them in force*" in the language of the statute, not for ten years from the date of citation, which as to ordinary debts interrupts prescription, but for "ten years *from the date of the order of court* reviving the same." It is questionable even whether any thing more than a mere *order* of revival is necessary under the statute, and whether it is necessary to await the delays of and clothe that order in the form of a judgment at all!

If, then, the proceeding under the statute was intended to revivify and "*continue in force*" *ab origine* the judgment, and with no other scope or object, how can it be said to be at all events the only and exclusive means of "*interrupting*" the prescription of the debt evidenced by the judgment, a subject and matter for which the law at the time of the passage of the act under discussion made other and distinct provision? See O. C. C. arts. 3482-3486 inclusive, and arts. 3514-3520 inclusive; but especially arts. 3436 and 3516 and 3517, which among the causes of interruption of prescription provide that "*prescription ceases to run whenever the debtor or possessor makes acknowledgment of the right of the person whose title they prescribed*" or "*of the debt.*" If, however, there was ever reasonable cause for doubt on this subject of the legislative intent, it was removed by the act of April 18, 1858, entitled an act to require *written proof* in certain cases (acts of 1858, p. 148), the first section of which provides "*that hereafter parol evidence shall not be received to prove any acknowledgment or promise to pay any judgment, sentence, or decree of any court of competent jurisdiction either in or out of the State for the purpose or in order to take such judgment, sentence, or decree out of prescription or to recover (revive) the same after prescription has run or been completed,*" and does not even stop there, but continues affirmatively "*that in all such cases the acknowledgment and promise to pay shall be proven by written evidence signed by the debtor himself or by his specially authorized agent or attorney in fact.*" Could there be any clearer legislative interpretation of the effect of the act of 1853 than is here given, or any clearer evidence that *prior* to the act of 1858 there was nothing to prevent the reception of parol evidence of the acknowledgment or promise to pay a judgment debt as well as one in any other form? And what would be the meaning or purpose of the Legislature in prohibiting the reception of *parol* evidence for such purpose in

## Succession of Patrick.

future, if evidence in any form could not be received at all? What, too, becomes of the positive affirmative provision of the act that such acknowledgment or promise to pay *any judgment, sentence, or decree of any court of competent jurisdiction shall be proved by written evidence signed by the debtor or his authorized agent*? It is manifest that the act of 1853 providing for the prescription and revival of judgments was not then considered or intended to exclude *any competent evidence* of the acknowledgment of a debt in the form of a judgment more than if in any other form. Had there, however, been at any time reasonable question on this subject, we think it was finally settled and removed beyond controversy when both the provisions of the act of 1858 and those of 1853 were incorporated in and made part of the Revised Civil Code of 1870; see articles 2278 and 3547 of the existing Code. The latter article, relating to the prescription and revival of judgments, comes under the general head of "Prescription," under that section which treats of "the prescription which operates a release from debt;" and under the immediate head "of the prescription of ten years," which follows in its order the provisions of the Code on the subject "of the prescriptions of one, three, and five years," and immediately precedes that of thirty years, while it is itself preceded by the provisions of the Code on the subject "of the causes which interrupt prescription," "of the causes which suspend the course of prescription," and is followed with only the intervention of a single article by the section of the Code under the same general head of prescription which treats "of the rules relative to the prescription operating a discharge from debts," wherein it is provided (art. 3551) that "*The prescription releasing debts is interrupted by all such cases (causes) as interrupt the prescription by which property is acquired, and which have been explained in the first section of this chapter.*" And it is also interrupted by the causes explained in the following articles, the first of which, art. 3552, reads: "A citation served upon one debtor *in solido, or his acknowledgment of the debt*, interrupts the prescription with regard to all the others, and even their heirs." And the next, art. 3553, that "a citation served on the principal debtor, *or his acknowledgment*, interrupts the prescription on the part of the surety;" while, under the preceding head referred to, among the causes which interrupt prescription are enumerated not only citation before a court of justice, but it is also provided (art. 3520) that "prescription ceases likewise to run whenever *the debtor* or possessor makes acknowledgment of the right of the person whose title they prescribed." All of the provisions quoted are general, and neither by the terms of the law, nor, we think, by any just rule of interpretation, can they be applied or confined to any particular period of prescription, or to any particular class of claims or evidences of debt to the exclusion of others. There

is nothing in their collocation or language to warrant so narrow a view, and by every fair and well established rule of interpretation, being upon a general subject under general heads, and being, also, general in their terms, they must have general application to all debts, however evidenced. The language used in regard to the prescription of judgments is no more peremptory than that in regard to other actions or debts prescriptible by ten years, or by any shorter or longer period. In regard to all alike, where there is no prevention, interruption, or suspension of prescription, it is an equally "peremptory and perpetual bar to recovery," where the creditor has been silent for the "requisite time, without urging his claim." C. C. 3459. We think, then, that, subject only to the exclusion of *parol evidence*, by what is not inaptly termed our statute of frauds, the prescription of judgments may be interrupted like other debts, or debts evidenced in other form, and that there is nothing to exclude the acknowledgment, promise of the debtor to pay debts of such high dignity, and the existence and amount of which has been ascertained and decreed in the most solemn form known to the law, any more than acknowledgments of other debts of less dignity, rank, and certainty. It may not be amiss to remark, also, that where the proceeding by "*scire facias*," which is somewhat similar to our statutory action of revival, prevails, that process is not the only means known to the law for the interruption or prevention of prescription.

Having answered the first inquiry with which we set out affirmatively, it only remains now to answer the second (i. e.): Has prescription been interrupted in the present case, and, if so, how?

On the fifth of March, 1875, the executor of Patrick filed a provisional account and tableau, from which the Sonlat judgment, claimed and held by Mrs. Carroll, executrix, was altogether omitted. On the twenty-first of April, 1875, she filed an opposition asking that she be placed on the tableau as a judgment creditor, with the proper rank and privilege. There was judgment in the parish court on the sixteenth of October, 1876; and on appeal in the Supreme Court, April 16, 1877, the opposition was sustained after a vigorous contest, and the existence and ownership of the judgment in question was decreed in favor of the same opponent, contradictorily with the executor of Patrick, who was ordered to file a new and amended tableau, and to place upon it said judgment. Accordingly an amended account and tableau was filed by the executor on the thirtieth of July, 1877, and the judgment of the opponent was recognized and placed upon it; at the same time, however, the executor of Dr. Patrick alleged the rendition in favor of the succession of a judgment versus Mrs. Ellen G. Patrick, with which he claimed to compensate to its amount that of the opponent, Mrs. Carroll; and also alleged that since the decree of this court, before recited, he



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Succession of Patrick.

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had instituted suit in the third district court of New Orleans, to revoke and set aside the transfer to Mrs. Carroll of the Soniat judgment, which he claimed rightfully to belong to Mrs. Patrick, the judgment debtor of the succession, and asked that further proceedings in the matter of account and tableau be stayed till the determination of the revocatory action in the third district court before mentioned. A copy of this proceeding in the third court was filed in the present case on the thirtieth of July, 1877, and appears in this record. Mrs. Carroll again opposed, and there was judgment on her opposition in the parish court, in accordance with the former decree of this court, and recognizing her rank and privilege as well as the amount of her judgment, which was ordered to be paid accordingly. It is from this judgment that the present appeal is taken, both by the executor and by Mrs. Carroll, the opponent, who complains of error in the judgment, which, while sustaining her opposition so far as to recognize her as a judgment creditor to the full amount of the Soniat judgment, and refusing the claim to compensate it with the judgment versus Mrs. Patrick, still preferred to her certain expenses and charges of the succession, altogether amounting to a little more than \$1100. In regard to this, we may as well now say that we are not prepared to say the parish judge erred as to the general rank of the items going to make up the sum; that the amounts are small, and such as, from their nature would seem to be legitimate and proper expenses and charges of the succession.

Recurring again to the other branch of the case: An examination of the pleadings both on the original opposition and that now under consideration discloses the fullest and clearest possible recognition by the executor of the existence, amount, and character of the Soniat judgment, which carried with it a vendor's privilege for lands sold to deceased, and found in the succession; and all within less than ten years from the rendition of that judgment, as we have seen by the dates already given. In the answer to the first opposition the existence, amount, and character of the judgment were not disputed, but, on the contrary, directly admitted. It was only the transfer to Mrs. Carroll which was attacked as simulated, fraudulent, and illegal, and the right claimed by the executor to compensate it with the same demand, not then in judgment against Mrs. Ellen G. Patrick. It was on these issues that our former decree, of April, 1877, was rendered against the executor, and in favor of the opponent, as heretofore stated. The amended account and tableau, filed subsequent to that decree, in July last, and the petition of the executor of Patrick accompanying, sets forth the Soniat judgment with the utmost minuteness of detail, and after recognizing and placing it upon the account makes up a statement of interest both on that and on the judgment against Mrs. Patrick, and strikes a balance after deducting it from

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Succession of Patrick.

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the Soniat judgment in favor of the latter of \$4411 62. The account thus stated is asked to be approved and homologated. It is difficult to conceive of a fuller or clearer acknowledgment and judicial admission in the most solemn form, within the period of prescription of the full amount of the judgment claimed by the opponent. But this is not all. Nothing could be more specific and direct in the way of acknowledgment of this judgment than the petition and suit in the third district court of New Orleans to revoke and set aside the transfer of it from Mrs. Patrick to Mrs. Carroll, the opponent against whom the prescription is here pleaded, and who has, year after year, and in various shapes and forms, been judicially "urging her claim," to use the language of the law. C. C. 3459. She has been any thing but silent, while unfortunately for his plea the executor of Patrick, in his vigorous efforts to defeat her, has been equally far from being silent, and, as we have seen, has in every pleading filed by him in every judicial proceeding down to the present, since the original provisional account, not only admitted, but himself directly alleged the existence and amount of the judgment set up by the opponent, and, according to his own allegations and proof in this proceeding, is even now waging vigorous contest to restore the title to this very judgment to the debtor of the succession which he represents, that he may thereby collect his debt by compensating the two judgments pro and con. The existence, exigibility, or amount of the Soniat judgment were, indeed, never denied by the executor or any one else until the plea of prescription of ten years was filed in this court in February of the present year. It is quite evident that counsel has relied in support of the plea entirely upon the idea that no other evidence except the order or judgment of revival provided by the statute could avoid the effect of the plea. We have, however, seen otherwise in discussing our first proposition; and we have now sufficiently reviewed the facts of this case to make it manifest that not only by the most solemn judicial allegations and admissions of the executor—who represents both the succession and the creditors—but, also, by the decree of this court on the former opposition between the same parties, all within less than ten years from its rendition on the fourth of January, 1868, the judgment and debt of the opponent, Mrs. S. E. Carroll, now wife of Noble, has been taken out of prescription, which has thus both by judicial proceeding to demand and enforce the debt, and by the most solemn admissions and assertions by the executor of its existence, been interrupted. There are some minor objections raised by counsel to the manner of proceeding to the trial of the opposition; all evidently intended for delay, which we do not consider it necessary to notice, as it was the duty of the executor of Patrick after our former decree to obey it according to its terms, and not again, in the face of that decree, to

## Succession of Patrick.

claim the right to compensate the judgment of opponent with that against Mrs. Patrick. We think he has no one to thank but himself for any subsequent complications or litigation in the present case, and that the parish judge did not err in disregarding this renewed attempt to assert rights already decreed adversely to his pretensions on the former appeal, or in giving to the opponent that trial of the opposition to which she was entitled under the law, as the case then stood. The same plea of prescription of ten years has been filed in this court against the judgments of Rebecca Rowe, No. 1766, and William Bagel, No. 1953, both of the docket of the fifth district court of West Baton Rouge. The former of these appears to have been rendered on the twenty-first of July, 1866, and the latter on the eighteenth of April, 1867, and would on their face appear to be prescribed. As, however, the executor of Patrick seems from this record not to have contested these judgments, but, on the contrary, to have, so far as appears, voluntarily placed them and the costs of court in them on his account and tableau, the homologation of which he prayed for, and, as no creditor or other party in interest appears before us to confess them, we think justice requires that these judgment creditors should not be taken unawares by the plea filed in this court for the first time, when they had good reason to believe their judgments not only not contested, but admitted. We will not, therefore, conclude them by our judgment. We have not dwelt upon a motion to dismiss the appeal of the executor of Patrick, No. 7052, but will now say that we think the grounds for dismissal untenable, and that the executor had a right to appeal. The motion to dismiss is, therefore, overruled. The lands upon which Mrs. Carroll, executrix, claimed the vendor's privilege were sold, in the succession, but an opposition was filed by her attorneys for her claiming her privilege on the proceeds. By means of this, and of her opposition heretofore filed, and that now before us, her privilege was preserved, and she is entitled to be paid her judgment out of the proceeds by privilege and preference over all other creditors; and if there be other sufficient funds in the succession to pay the expenses and charges thereof, by preference and privilege over them, also. She asks that the judgment of the parish court be modified and amended as to so decree. This, we think, she is entitled to. The appeals of Mrs. Carroll, executrix, and of Butler, executor of Patrick, numbered respectively on the docket of this court 6957 and 7052, were both in the same case and from the same judgment. They were argued and submitted together, and this opinion applies to and covers the whole case on both appeals, the only difference being as to the matter of costs.

It is therefore ordered and decreed that the pleas of prescription against the Soniat judgment of Mrs. Sarah E. Carroll, executrix of Joseph Carroll, deceased, be and they are overruled, and the judgment below be

so amended as to her as to require that the debts and charges allowed in preference to hers be paid out of the funds of the succession of Patrick derived from other sources, so far as sufficient for that purpose, before any contribution thereto is called for or made from the funds or price of the land upon which she is decreed to have the special privilege of vendor for the payment of her judgment, and that, in other respects, as to her and her said judgment and debt, the judgment of the court below is affirmed, the succession to pay costs of both courts on her appeal, 6957. It is further ordered and decreed that so much of this case as relates to and is affected by the plea of prescription filed in this court to the judgments of Rebecca Rowe and of William Bogel be remanded to the court below for the trial of that question only, and as between the holders of said judgment and the succession the costs of appeal number 7052 by the executor of Patrick await the judgment on the question of prescription, and as to all others that said costs be paid by the succession of Patrick.

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DISSENTING OPINION.

MANNING, C. J. I think the plea of prescription should be sustained. In my opinion, it was not intended by the legislature, in passing the act of 1853, to permit any other method of preventing the prescription of judgments, save that of a citation for its revival. In framing that law, the General Assembly must be presumed to have taken into consideration all the possible modes of acquiring prescription of obligations, and of interrupting or suspending it. The law about to be framed was an innovation of a most serious kind, and the consequences of such an enactment must have been foreseen. Notwithstanding those possible consequences, which did not require any special sagacity to discern, it was enacted that judgments should be prescribed by the lapse of ten years, provided however that the party who wishes to keep them alive might have them revived by pursuing a specified course. The Soniat judgment, which opponent now owns, has never been revived, nor has citation to revive been served upon the representative of the defendant in the judgment. Ten years have passed since its rendition, and I think the plea fatal to its continued existence. *Suc. Hardy*, 25 Annual, 489. *Smith v. Palfrey*, 28 Annual, 615.

Even if its acknowledgment by an administrator, or the placing it on a tableau of debts, were sufficient to interrupt prescription, (and I do not think it is of a *judgment*) in this case, so far from there being any acknowledgment that the Soniat judgment was a valid claim against the succession, it was constantly disputed—it was not recognized as one of the liabilities of the succession, and it was not until a decree of this

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Succession of Patrick.

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court was made, directing that the executor of Patrick should place it on his tableau, that any recognition of it was ever made. When that decree was made, the judgment was not prescribed—ten years had not elapsed—and it was therefore properly made, but in the interim, the full term has passed, and the plaintiff or her assignee has neglected to issue any citation for revival, and the judgment has, as I think, become extinct.

The difficulty lies in the construction of the act of 1858, which is said in the Opinion of the court to be a legislative interpretation of the act of 1853. There is so much force in this position that at first glance it seems conclusive. Nevertheless I do not adopt it.

The first section of that Act, the object of which was to require written proof in certain cases, prohibits parol evidence being received to prove any acknowledgment to pay any judgment for the purpose of taking it out of prescription, or to recover it after prescription has been completed, but requires such acknowledgment to be in writing. It may be very pertinently asked, if nothing but a citation to revive can prevent the acquisition of prescription, why prohibit a parol promise from producing that effect, and why enact that the promise must be in writing?

I do not think the act of 1858 can be held to be, or that it ever was supposed to operate, a repeal of that of 1853, and the latter had expressly enacted that the judgment should be prescribed in ten years, providing however that this might be prevented by a citation to revive. It was supererogatory for the legislature to say in 1858 that a parol promise to pay a judgment should not interrupt or prevent prescription, but that the promise must be in writing, because at that time it was positive law that neither the one nor the other could produce that effect so as to revive the judgment. The act of 1853 had rigorously declared that the lapse of ten years would inevitably destroy a judgment unless the party owning it should before the completion of that period cite the judgment debtor to revive it. It was superfluous afterwards to say, a parol promise to pay should not enable one to recover it, for neither parol nor written promise could effect its revival. It should be observed that the act of 1858 does not enact in positive terms that a written promise shall interrupt prescription, and thereby repeal *pro tanto* the act of 1853, but that hereafter parol evidence shall not be received to prove any acknowledgment of a judgment, but the same must be in writing. The prohibition was unnecessary, because after you had received in evidence both the parol and the written promise, and the proof of acknowledgment was complete, you were as far as ever from keeping the judgment alive, inasmuch as the law of 1853 had stricken it with an incurable paralysis, if its holder had neglected to have issued a citation for its revival.

There are peculiarities of diction in both the texts of the law of 1858 which strengthen my construction of it, if they affect it at all. The word 'recover' in the first section has *recouvrer* in the corresponding text, so that we are not left free to conjecture that 'revive' was intended to be used, as we certainly should if '*revivre*' was in the corresponding French text.

The law of 1858 then is, that you must have a written promise to pay a judgment in order to take it out of prescription, or to *recover* it after prescription has been completed. The law of 1853 had already enacted that prescription was completed in ten years unless you had commenced proceedings to *revive*. The harmonious construction of the two laws is, that a citation to *revive*, timely served, keeps the judgment continuously alive, while a written promise or acknowledgment will enable you to *recover* the judgment, *after* prescription has been completed—will enable you to revitalize it.

But in that case, you must bring your suit on the extinct judgment, and shew your right to *recover* by proving the written promise or acknowledgment. Nothing of that kind has been done here—nothing has been done at all, except to contest the accounts or tableaux of the administrator of the deceased judgment debtor.

There is still another fatal objection to the construction of the majority of the court. The act of 1858 is now sec. 2818 of the Revised Statutes of 1870. The act of 1853 is now art. 3517 of the Revised Civil Code. Where these conflict, the Code must prevail. The act of 1853 must then prevail over that of 1858, and the enactment which imperatively requires a citation to *revive* as the only method of keeping alive a judgment, or of preventing prescription, is the paramount law. How then is it possible for this Soniat judgment to escape an extinction, twice pronounced by the legislative will as sure to befall all judgments that have not been revived, or the judgment debtor cited for revival within ten years?

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
OPELOUSAS.

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JUNE, 1878.

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JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,	} <i>Associate Justices.</i>
HON. A. DEBLANC,	
HON. W. B. EGAN,	
HON. W. B. SPENCER,	

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No. 1015.

SUCCESSION OF ORAMEL HINCKLEY. ON EXCEPTION OF HEIRS.

When the judgment of the lower court on an exception filed to the account of a syndie, is in effect the dismissal of his account, and a refusal to hear his proofs of its correctness, he is entitled on his averment that he can file no other account, to an appeal from the judgment.

An exception to the account of a syndie on the ground of its unintelligibility, should clearly set forth wherein it is amenable to such an objection, and the syndie should be allowed to introduce proofs of its correctness.

**A** PPEAL from the Parish Court of St. Landry. *Fontenot, J.*

*E. D. Estilette and Kenneth Ballio for heirs and appellees.*

*Jas. M. Moore for syndie and appellant.*

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Oramel Hinckley died several years ago insolvent.

A meeting of his creditors was called, and they deliberated upon and

determined the mode of settlement of the estate, and appointed Dominique Lalanne syndic. He assumed charge, and has filed his final account of his gestion. Due publication was made of this filing, and the heirs were cited to appear and oppose it, if there should be cause. They appeared, and instead of an opposition, filed an exception, averring that they were unable to understand the account because of its obscurity, and unintelligibility, and because it is not a full and fair account as contemplated by law, and they pray that the syndic be ordered to file another.

They do not specify or particularize the obscurities, nor in what respect the account is unintelligible, nor why they consider it unfair or incomplete. The court sustained their exception, and the syndic appeals. The heirs now move to dismiss the appeal, because it is from an interlocutory order, and works no irreparable injury.

The judgment is in effect a dismissal of his account, and a refusal to receive his proofs of its correctness, and is irreparable, if his averment be true that he can file no other.

The motion to dismiss is refused.

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#### ON THE EXCEPTION.

In October 1871, the syndic filed a tableau of classification of the debts of the succession, and a provisional account of his administration. The heirs opposed the homologation of this tableau and the account, which they subsequently withdrew, and a homologation was decreed, and the syndic was ordered to pay the debts and charges as they were classified. The syndic obeyed this mandate, and the account now filed is a statement of what he did under that decree.

The heirs have not opposed the account specifically, but content themselves with averring their inability to understand it, and do not point out in what particulars it fails to be full or fair. We do not participate in their want of comprehension. On the contrary it appears on its face to have been stated with more than ordinary perspicuity, and completeness.

The syndic was entitled to have the objections to the account set forth with sufficient detail to enable him to know what they were. A general opposition even would put him to the proof of each item, as it is assimilated to the plea of the general issue in an ordinary suit, and would require the production of his vouchers on the trial, or other proof equivalent thereto. The syndic has not had an opportunity to offer any voucher, or to establish the correctness of his account in any way. He is bound only to file an account, sufficiently full and specific as to be in-



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Succession of Hinckley.

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telligible to ordinary comprehension. He is not bound to supply the heirs with the faculties which will enable them to comprehend it.

The judgment of the lower court is erroneous. Therefore

It is ordered, and decreed that the judgment of the court *a qua* is avoided and reversed, and the exception of the heirs is overruled and dismissed, and the cause is remanded to be proceeded with according to law, the appellees paying costs of appeal.

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## No. 1016.

## FRANK GONZALES vs. J. T. LINDSAY, TAX COLLECTOR.

When the constitutionality of a tax is at issue, this court has jurisdiction regardless of the amount in dispute.

The justices' courts have authority to issue injunctions in all tax suits brought before them of which they have jurisdiction.

When a party sues in a justice's court to enjoin the collection of an alleged illegal tax, it is not necessary to allege any specific indebtedness by way of damages, in order to give the court jurisdiction.

The police jury of a parish are not a necessary party to a suit brought by the State tax collector to enforce the payment of parish taxes.

An ordinance of a police jury, passed prior to April 20, 1877, imposing a parish tax of over four mills on the dollar for general parochial purposes, and not afterward sanctioned by the vote of a majority of the taxpayers of the parish, is illegal.

**A** PPEAL from the Justice's Court, Third Ward, parish of Cameron.  
*Gee, J.*

*Geo. H. Wells* for plaintiff and appellant.

*A. J. Kearney* for defendant and appellee.

## ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves to dismiss on the ground that the sum in dispute is less than \$500, and there is no question of the constitutionality or legality of any tax involved.

The sole question is the legality of a tax, and that gives jurisdiction, regardless of the amount. The motion is frivolous, and is denied.

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## ON THE MERITS.

An injunction was obtained by the plaintiff to restrain the collection of an alleged illegal tax. The police jury of Cameron parish had levied parish taxes on the assessment rolls for 1876 to an aggregate amount of eighteen mills on the dollar. The plaintiff alleges that this levy, which is in excess of the rate permitted by law, was not sanctioned by a vote

of a majority of the tax payers, and is therefore illegal. He tendered the sum he actually owed, on a levy of four mills on the dollar, in legal tender currency, and enjoined the threatened sale of his property for the purpose of collecting the excess of the amount he legally owed.

The defendant excepted to the action, and moved to dissolve the injunction on these grounds ;

1. That the court had no authority to grant the injunction.

The writ was issued by the same Justice's court, in which the tax collector had proceeded for the enforcement of the tax, and was the proper tribunal to hear and try the injunction. Justices of the Peace are authorized by express law to issue injunctions in causes within their jurisdiction, and special authority is conferred upon them to take jurisdiction of all claims for taxes when their amount does not exceed one hundred dollars exclusive of interest. Code of Practice, arts. 1063, 1064, 1096, 1126, 1152.

2. That the tax collector had given bond for ten thousand dollars, and as this action is against him in his official capacity, his bond is necessarily attacked, and its amount puts this case beyond the jurisdiction of the Justice's court.

Although we find this ground repeated in the defendant's brief, we doubt if he was serious in urging it. It is wholly untenable.

3. There is no allegation in the plaintiff's petition of any specific indebtedness by way of damages upon which the court could predicate jurisdiction.

Nor need there be. Jurisdiction is given to that court, and to this, by the allegation and the fact that the defendant was about to enforce the collection of an illegal tax by the forced alienation of the plaintiff's property.

4. The defendant derived his authority to collect taxes from the police jury, and that body is a necessary party to any suit to restrain their collection.

That is a mistake. The defendant derives his authority from the legislature, which has made the collector of the State taxes also the collector of the parish taxes. Rev. Stats. sec. 2792.

But if it were otherwise, and he derived his authority direct from the police jury, that body would not be a necessary party to this, or any similar suit.

The resolutions or ordinances of the police jury are illegal and null, so far as they authorize, or attempt to impose, a parish tax greater than four mills on the dollar for general parochial purposes. There are special laws authorizing other special taxes for special purposes. *Lafitte v. Morgans*, 29 Annual, 1.

The act of 1877, authorizing police juries to levy a tax of ten mills

on the dollar, and an additional tax under certain specified circumstances, was not passed until April 20th of that year. The ordinances of the Cameron police jury, under which the defendant was proceeding, were all adopted prior to that date, and consequently before that body had legal authority to impose a tax of that date.

The lower court sustained the exception, and dissolved the injunction. This is error. Therefore

It is ordered, adjudged, and decreed that the judgment of the Justice of the Peace herein is avoided and reversed, and it is further decreed that the injunction be reinstated, and that the lower court proceed to the hearing of the same. It is also adjudged and decreed that the plaintiff recover of the defendant the costs of appeal.

#### No. 1017.

#### MARAIST, FOURNET & Co. vs. C. CAILLIER, ADMINISTRATRIX.

When parties silently acquiesce in and enjoy the benefits of a confession of judgment made in their names by an attorney at law, who has acted in the matter to their knowledge as their representative, they will be estopped from afterward denying the authority of the attorney to represent them.

The makers of a promissory note can not annul a judgment obtained against them on said note by the administrator of a succession, on the ground that the note did not belong to the succession, or on the ground that the administrator was not qualified to act as such.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin.  
*Fontelieu, J.*

*F. & M. Voorhies* for plaintiffs and appellants.

*Mouton & Martin* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. In the suit of Celestine Caillier, administratrix, vs. Maraist, Fournet & Co., plaintiff obtained judgment against said firm and G. A. Fournet for \$558 30, being the amount of their promissory note payable to the order of Joseph Caillier, of whom plaintiff was sole heir and claimed to be administratrix.

The judgment was rendered after answer by all the defendants, in which they confessed their indebtedness. This answer was signed by G. A. Fournet, as their attorney at law. In the judgment it is recited as having been rendered "by reason of the law and evidence being in favor of plaintiff," etc., "and for the further reason that defendants have confessed judgment," etc. The judgment then decrees a stay of execution as to all the defendants until first March, 1878. It was signed 29th May, 1877.

This is an action to annul that judgment, and it was filed March 8, 1878. The grounds of nullity are in substance—

First—That it was rendered on confession contained in the answer filed by G. A. Fournet, attorney at law; that said attorney was without authority to confess judgment, and was not the attorney of said Maraist, Fournet & Co., which firm was composed of three members, A. Maraist, Charles St. Germain, and V. A. Fournet.

Second—That the note sued upon was not the property of Joseph Caillier or of Celestine; but was given to said Joseph Caillier in settlement of a balance due him as executor of Uranie Patin, said executor having surrendered certain mortgage notes of V. A. Fournet in exchange for said note so sued upon.

Third—That said Celestine was never legally appointed or qualified as administratrix of her said deceased father Joseph, and had no right to sue on said note.

We will consider these grounds of nullity in their order.

First—The judgment recites that it was rendered “by reason of the law and evidence” as well as “by reason of the confession.” But we are disposed to give plaintiffs the benefit of their proposition that it was rendered on confession. G. A. Fournet was an attorney at law, and the evidence shows that V. A. Fournet and Maraist consulted him about this suit. True, they swear they did not employ him as attorney, or authorize him to confess judgment. V. A. Fournet admits that a few days after the judgment G. A. Fournet told him about the judgment, and that “he had obtained a stay of execution.” Auguste Maraist admits that he knew all about the judgment having been rendered. In fact, he was sworn as a witness for plaintiff. He admits that as soon as he got off the witness-stand he retired to a room and called G. A. Fournet and told him to see that a stay of execution was obtained, and G. A. Fournet promised to do so. That the next day on going to the courthouse G. A. Fournet told him he had obtained the stay of execution until first March, 1878. Other witnesses show that Maraist heard the attorney, G. A. Fournet, read the answer in open court. St. Germain, the other party plaintiff in this cause, admits that he knew of the suit, but says he left the management of lawsuits to his partner, Maraist. He says he never authorized any attorney to appear or answer or confess for him.

But there is one fact which to our mind utterly destroys the pretense of plaintiffs in this cause. It is that with full knowledge of the act of G. A. Fournet confessing judgment for them, and knowing that the judgment had been rendered, they quietly avail themselves of the long stay of execution stipulated in their favor—from May to March—nearly a year. During all this time they are silent. They are gathering

the fruits of their attorney's alleged unauthorized acts. When that delay expires and the plaintiff wants her money they suddenly awake and claim that the attorney had no authority. They can not be thus permitted to enjoy the advantages gained for them by the attorney and repudiate the burdens imposed.

This case does not differ in principle from that of *Lallande vs. Jones*, 14 An. 715, when this court held that the defendant, who availed herself of the stay of execution stipulated for her by her attorneys in a confession of judgment, would not be heard to deny their authority to make the confession.

As to the second and third grounds of nullity, there is no force in them. The note sued upon belonged to Jos. Caillier. It was payable to his order. It did not belong to the estate of Patin. The fact that Caillier obtained it in payment of or exchange for notes of the estate held by him as executor did not make it the property of that estate. He was responsible to that estate for the notes he gave up, and could not have compelled it to take the note he got in return. If that note was lost or worthless, it was his loss, not the estate's.

It needs no argument or authority to show that the want of capacity of Celestine as administratrix of her father's estate is no ground to annul the judgment. It could not have been pleaded even, except *in limine*. Besides, the allegations of the defendants in that suit show that she was sole heir of her father.

There is no error in the judgment appealed from, and it is affirmed with costs of both courts.

#### No. 1007.

#### AUG. MARAIST, SYNDIC, VS. HONORÉ GUILBEAU, ADMINISTRATOR.

The homologation by the clerk of the court of a tableau of the debts of a succession filed by the administrator, on which tableau a certain sum is set forth as due to a certain creditor, does not amount to a judgment for that sum in favor of the creditor, and hence does not authorize him to proceed by rule against the administrator to enforce the payment of the sum.

**A** PPEAL from the Parish Court of St. Martin. *Bassett, J.*

*F. & M. Voorhies* for plaintiff and appellant.

*J. E. Mouton* and *R. Martin* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Honoré Guilbeau, administrator, filed a "tableau of the debts and charges of the estate of Dr. John H. Thomas, and of the community which existed between him and his second wife, and proposed distribution of funds, etc."

The gross amount of money to be distributed was \$4047 81, proceeds of two sales, of which \$192 05 belonged to the estate of Thomas alone, and \$3855 76 to the community. The aggregate of debts was \$13,870 94, of which \$1512 70 were for costs and expenses of administration: \$3000, due the widow under the marriage contract, and \$7068 02, sums due the children for whom the deceased had been tutor. There is also put down as a debt the sum "due Broussard & Tertrou, two notes and an account, amounting in capital to \$1590 07." This was an ordinary debt, while the other debts just enumerated were secured by mortgage and privilege.

After due publication, no opposition having been filed, this tableau was approved and homologated by the clerk of the court, in July, 1866. The record does not show what disposition was actually made of the funds, nor that any further proceedings were had in the succession.

In February, 1877, August Marais, styling himself syndic of the insolvent firm of Broussard & Tertrou, brought suit in the parish court, to recover of Guilbeau personally and as administrator the \$1590 07 put down on the tableau. This suit was dismissed, on exception, for want of jurisdiction; and, shortly after, Maraist caused notice to be served on Guilbeau, "that a final judgment of homologation of the tableau of classification in said succession has been rendered on the seventh July, 1866, against you; and, unless you pay, in ten days from the service hereof, the sum of fifteen hundred and ninety dollars and seven cents, due August Maraist as syndic of the late firm of Broussard & Tertrou, according to the tableau of classification, with interest, etc., execution will issue for the amount."

After the expiration of the ten days, a rule was taken in the succession of Thomas, by Maraist against Guilbeau, to show cause why he should not pay the amount of the demand, and, in default thereof, why an execution should not issue against him personally, and his property be seized and sold to satisfy the same.

Guilbeau excepted that the proceeding was not countenanced by law; and that plaintiff could not proceed by rule to obtain the relief sought by him. The exception was overruled, and thereupon the counsel of Guilbeau offered to file the peremptory exception of prescription of five and ten years. The bills of exceptions show that the offer to file this exception escaped the attention of the parish judge; and he proceeded to make the rule absolute. Guilbeau obtained an order of appeal; but subsequently he moved to have the order rescinded, and for a new trial, which was granted. On the new trial the plea of prescription was maintained, and the rule was dismissed; and this is the judgment appealed from.

This entire proceeding is founded on a misapprehension of the law. Prior to the adoption of the existing constitution the clerks of court were authorized to homologate accounts; but the order of the clerk homologating an account was not a judgment against the executor or administrator in the sense of articles 1053, etc., of the Code of Practice. It is manifest that the account or tableau filed by Guilbeau did not propose to pay any sum whatever to Broussard & Tertrou. It would have required more than double the amount of money in the hands of the administrator as shown by that tableau to have paid the widow and children, and the costs of administration. No opposition was filed to this tableau, and the homologation, if it could be termed a judgment, was such a judgment as concluded Broussard & Tertrou, so far as the amount to be distributed as set down in the tableau was concerned; and so far from being a judgment in their favor, against the administrator, it was, if a judgment, one which cut them off from the hope even of any participation in that fund.

The creditors placed upon a tableau of distribution are concluded by the judgment homologating that tableau, so far only as the fund to be distributed under that tableau is concerned; and they can claim under the judgment of homologation only such sum as may be allowed them by that judgment. No sum was allowed to Broussard & Tertrou by the tableau, or by the order of the clerk homologating it; and they were placed on the tableau not in order that they might receive any part of the fund then in the hands of the administrator, but merely for the purpose of exhibiting and classifying the debts of the succession.

By the Code of Practice, articles 1053, *et seq.*, the creditor in whose favor a judgment has been rendered, against a curator, or executor or administrator, for a sum of money, may proceed by notifying such administrator, etc., and by execution against his property, where he has funds of the succession in his hands and refuses or neglects to pay such judgment. The basis, the *sine qua non* of this proceeding is a judgment, for a sum of money, against the administrator, etc. As there was no such judgment in this case, there was no foundation, no legal warrant or authority for the proceeding by notice and rule; and it should have been dismissed on that ground. See Lockhart vs. Wall, 14 An. 274.

It is not necessary to pass upon the plea of prescription, because our conclusion is that the first exception taken by defendant, appellee, should have been maintained, and the proceeding dismissed; and we prefer to put our decision upon, and to remit it to that ground.

For the reasons stated in this opinion, the judgment of the parish court dismissing the rule and proceeding is affirmed with costs.

Mr. Justice DEBLANC having recused himself, takes no part in this decision.

No. 1018.

PARISH OF ST. MARTIN EX REL. M. BAKER, ROAD OVERSEER, VS. PELLETIER  
DELAHOUSSEY.

When the face of the papers sufficiently present the issue involved in an appeal from a justice's court, no statement of facts need appear in the record. The ordinance of a police jury imposing a fine on persons between certain ages for falling, or refusing to work on the public roads, is constitutional.

**A** PPEAL from the Justice's Court, First Ward, parish of St. Martin.  
*Easten, J.*  
*Mouton & Martin* for plaintiff and appellant.  
*E. Simon* for defendant and appellee.

## ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves to dismiss for the reason, "that there is no statement of facts to be found in the record of the testimony adduced at the trial, and shewn to have been offered, nor any assignment of error, nor any bill of exception," and for the further reason that the certificate of the Justice of the Peace does not state that the record contains all the testimony adduced.

The first ground stated would be unintelligible, but for our being able to divine its meaning from having seen the same phraseology in many of the transcripts filed here. The ground is, that there is no statement of facts of the testimony. This is a solecism. The only occasions when a statement of facts has a place in a record is when none of the testimony is in it. If the testimony is taken down in writing, (and that practice obtains universally in our courts now), it may and does serve in the stead of a statement of facts. Code of Practice, art. 601.

If the testimony has not been taken down in writing, then and then only, the parties or their advocates must jointly draw a statement of the facts proved, and if they can not or will not do it, the judge must make the statement. *Idem*, arts. 602-3.

There are four modes by which this Court can review a case on appeal. 1. When the testimony has been reduced to writing, and is contained in the record. 2. In the absence of the testimony, when a statement of facts has been made by the parties, or their counsel, or by the judge. 3. When there is a written exception to the opinion of the judge. 4. When a special verdict has been rendered. *Idem*, art. 896.

Most of the transcripts filed here call the note of evidence, 'statement of facts'. How such a misnomer was ever made may serve for the speculation of the curious, but it is apparent that the mover here has



made the same mistake, and that he means to say by way of objection that there is no note of the evidence that was introduced to be found in the record.

The appeal is from a Justice's court. There is no provision for taking down the testimony in writing in a justice's court. He has no clerk, and the pleadings are oral. The parties there, as in the higher courts, can agree upon a statement of facts, and it is their duty to do so. The justice is required to transmit the statement of facts thus agreed on to the appellate court. *Idem*, art. 1135.

We are satisfied none was made or agreed on in this instance, because the face of the papers sufficiently present the issue.

The motion is denied.

#### ON THE MERITS.

The defendant was summoned to work on the public roads of St. Martin parish, and having refused, incurred a fine of one dollar for each day that he failed to obey the summons. The overseer of the road sued him for four dollars, the fines for as many days of delinquency.

The defendant pleaded a general denial, and the "unconstitutionality of the tax levied upon him," and there was judgment in his favor. The justice has furnished written reasons for judgment, which begin by properly reciting that the action is for the recovery of four dollars forfeiture or fines for having refused to work on the roads, but conclude by ruling that the ordinance of the police jury, imposing the fines, levies a direct tax upon the people, and is therefore unconstitutional.

The justice is in error. Police juries are authorized to pass all ordinances relative to roads, and to impose such fines and penalties to enforce them as they may think proper, and these fines may be enforced by ordinary process in the name of the police jury. Rev. Stats. sec 3364.

The police jury of St. Martin passed an ordinance requiring persons between certain ages to work on the public roads, and imposed a fine of one dollar for each day of failure to work when required. The defendant incurred the penalty denounced by the ordinance, after having been duly summoned, and he must pay for his dereliction of public duty.

One of the surest tests of the civilization of a country is the condition of its public roads. Years ago, at the termination of that period when able-bodied men were needed elsewhere than at home, there was good excuse for impassable roads, but there is no good reason now why those who are liable to road duty should not be made to contribute a part of their time and labor to relieving the country from the reproach of

having highways which are a danger to the traveller, and an obstruction to those who have to transport produce over them.

It is ordered, adjudged, and decreed that the judgment of the Justice of the Peace is avoided and reversed, and it is further decreed that there be judgment in favor of the parish of St. Martin against the defendant Pelletier Delahoussaye for four dollars, and all costs of the lower court, and of this appeal.

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No. 1020.

ARCHIE P. WILLIAMS vs. A. GARIGNES, TAX COLLECTOR.

A livery stable keeper who has paid as such, his State license tax, can not be compelled to pay an additional license to the State on the hacks and buggies employed by him in his business.

**A** PPEAL from the Parish Court of St. Landry. *Fontenot, J.*

*Kenneth Baillio* for plaintiff and appellant.

*Jno. N. Ogden* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. In his capacity as tax Collector, defendant has seized and offered for sale two hacks and two buggies belonging to plaintiff, to satisfy the sum of sixty dollars, which said Collector claims as due to the State upon the vehicles thus seized, which—it is admitted—are used by plaintiff in his business as keeper of a livery stable in the town of Opelousas.

The intended sale of those vehicles was enjoined by the owner, on the grounds :

1. That there is no law which authorizes the levying of the licenses claimed.

2. That, if there is such a law, it is unconstitutional.

Plaintiff, it is shown, has paid a license of twenty-five dollars, to pursue his occupation as the keeper of a livery stable, and he contends that no additional license can be claimed from him for keeping and hiring hacks and buggies.

The law under which the collector is attempting to collect these additional licenses is in these words : "From each keeper of a livery stable or yard, or livery and sale stable, with stalls for horses or mules, twenty-five dollars ; for every public hack twenty-five dollars, etc."

The stable, the ground on which it is built, the hacks, buggies and horses are assessed and taxed as property, in proportion to their value : an income tax is levied upon the keeper of the public stable, and he can not be compelled to pay—in addition to the tax—a license on every hack,

buggy and horse which he owns, and without which he would be restricted in the pursuit of an already licensed occupation. As well might a merchant be licensed as such, and be made to pay, besides, a separate license to sell hats and shoes, a physician to carry a lancet, an attorney to keep the Codes in his office.

What is a livery stable? A place where horses are groomed, fed and hired, where vehicles are let. Without horses and without vehicles a stable is incomplete. To keep a hack for hire is a calling: to keep a stable and several hacks is another, a different calling: both are taxed alike, and but one license can be imposed by the State on those who pursue but one occupation. Were it otherwise, every industry would soon be discouraged or prostrated.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiff's injunction perpetuated at the costs of the Tax Collector.

## No. 1028.

B. D. WOODS &amp; BROS. vs. CHAS. J. PICKETT ET AL.

The part owner of a vessel, not interested in her carrying passengers and property for hire, is not liable as a commercial partner for debts incurred for her running expenses.

The part owner of a vessel can not be held even to a *pro rata* liability on a draft drawn by another part owner in the name of the vessel and her owners, for an insurance of the vessel taken out for the benefit and security of a third person; unless he has authorized, or has ratified the drawing of the draft, or profited by it.

**A** PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

*Lewis & Bro.* for plaintiffs and appellants.

*Garland & Dupré* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs sue Charles J. Pickett, C. C. Pickett, James Powers, W. R. Verlander, and Cleophas Comeau as owners of the steamboat *Fleta*, and as commercial partners engaged in carrying persons and property for hire.

Their demand is for an account of \$233 for coal furnished said boat, and the amount of a draft given to the Hibernia Insurance Company, on and accepted by plaintiffs, for \$640, being for insurance on "the hull" of said steamer, and signed "C. J. Pickett, for steamer *Fleta* and owners," date January 12, 1876.

The only defendant before us is Cleophas Comeau. His answer is a

general denial. There was judgment below for him, and plaintiffs appeal. In this court he pleads the prescription of one year against the coal account.

The questions presented for our decision are :

1. Was Comeau a part owner of said steamer, and a partner in the business of running her at the time these debts were contracted ?

2. If so, is he liable for them in whole or part ?

The testimony on the subject of ownership is voluminous ; so much so that to even recapitulate it would transcend the limits of an ordinary opinion. It satisfies us that he was a part owner, and interested in the business of running said boat from the eleventh of June, 1875, and that Roy was simply a person interposed to hold title for him.

The joint owners of a vessel are not partners. But those engaged in running them to carry persons and property for hire are commercial partners. C. C. (old) 2796 ; 29 A. 345.

Debts incurred, therefore, for running expenses of such vessels are partnership debts, and as to such obligations each partner is the agent of the others, and their rights and obligations are governed by the ordinary rules of commercial partnership. Their liability is solidary.

But it is different with those who are simply joint owners. As we have said, they are not partners, or governed by the rules of partnership. One of these joint owners, as such, has no authority to bind his co-proprietors by drawing drafts or notes in their name ; and they will not be bound in the absence of proof of authority so to do, or of some actual and resulting advantage.

Applying these principles to the case before us we find that Comeau as a commercial partner would be liable for the coal bill sued for, if contracted during the existence of his connection with the firm. But the defendant contends that Comeau's connection therewith only commenced on June 11, 1875, and such is the fact. That all coal bought after that date was paid for by payments made thereafter. We find, on inspection of the account, that the amount of coal bought after June 11 was \$320, and the sums paid thereafter \$320. Defendant can only be charged for items after he became a partner, and is entitled to credit for all sums paid after that event, as it is reasonable to suppose they were paid out of the partnership fund. We think, therefore, that plaintiffs can not recover on this account. It is, therefore, unnecessary to notice the defendants' plea of prescription.

As we have seen, the draft sued upon was drawn by "C. J. Pickett, for steamer *Fleta* and owners," and was for premium for insurance on her hull. This can not by its very terms be considered a partnership debt. It purports to be for account of the owners, who, as we have seen, are not partners. It is for insurance on the hull of the boat, which

is not partnership property. The partnership was in the use of the boat. It had no insurable interest in the hull. If, therefore, Comeau is liable on this draft at all, it is for only one third the amount of his interest in the boat. But he is not liable for that unless, first, he authorized Pickett to insure the boat or draw the draft; or, second, has ratified his acts, or derived profit or advantage therefrom.

It is not pretended that he has done either of the first named things.

Has he ratified Pickett's acts or profited thereby? So far as this record discloses, we find no act of Comeau from which we can deduce a ratification. It is shown that when Pickett bought this boat, and before he sold to Comeau, he borrowed \$5000 from A. H. May, and gave him a mortgage on the boat. That in that act he agreed and bound himself to keep the same insured for May's benefit. That the boat was so insured, and that the premium for which said draft was given was for a renewal of that policy for May's benefit. The loss in such cases the policy declares shall be paid to May as his interest may appear. We do not see how Comeau could have profited by that policy had the vessel been lost. Certain it is that he has never drawn advantage or profit from it. Under the proofs in this case we think plaintiffs have failed to make out a case of liability on Comeau's part for this draft or any part of it.

The judgment appealed from is therefore affirmed with costs of both courts.

No. 1003.

BOARD OF SCHOOL DIRECTORS vs. O. DELAHOUSSE, SR.

Up to the year 1877 the State tax collector was prohibited from paying over any school taxes collected by him, to any one but the treasurer of the School Board, and his payment of any portion of those taxes to the parish treasurer, prior to the year 1877, did not discharge him from liability for them. But when it appears that such payment of school taxes to the parish treasurer was made by a collector in good faith, and was approved by the police jury, and inured to the benefit of the parish, the parish should re-imburse to him the amount thus unduly received.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin.  
*Fontelieu, J.*

*J. E. Mouton* for plaintiff and appellant.

*Ed. Simon* for defendant and appellee.

*Robert Martin* for the parish, warrantor.

The opinion of the court was delivered by

SPENCER, J. This suit is brought to recover of defendant the sum of \$1971 46, the amount of parish school tax of 1873, collected by him

as State and Parish Collector of St. Martin parish during the year 1874 and 1875.

The defendant does not dispute the collection, but claims to have paid over the amount to the parish treasurer of said parish, from whom he received a quietus. Defendant further claims that the parish of St. Martin is bound to warrant and indemnify him against plaintiff's demands, and he prays that the parish be cited, and for judgment in warranty, etc. The parish answers by a general denial, and by averment that if the parish treasurer received said school collections, he had no authority so to do, and the parish is not bound by his acts, done outside the scope of his official duties. There was judgment for defendant, and plaintiff appeals. The facts which are material appear to be as follows :

Baker, the treasurer of the school board, had left the parish, and refused to receive the school funds so collected by defendant, who, thereupon, by advice of the district attorney, paid the amount of the school tax into the hands of Amy, the parish treasurer, in common with, and as other parish taxes, and took his receipt for the gross sum paid. It is shown to our satisfaction that the school tax was included in this payment to the parish treasurer. It is also shown that the police jury in open session on the fifth July, 1875, carefully examined and accepted said settlement between the treasurer and collector. There are but two questions presented for our decision: First, was the payment of the school tax to the parish treasurer a valid payment, and did it discharge Delahoussaye? Second, if not, can he recover the amount thus paid in error from the parish of St. Martin?

First. As to the authority of the parish treasurer to receive the school-fund tax. By section two of act 122 of 1874 tax collectors are expressly prohibited from turning over school taxes collected to any police jury or parish treasurer, or to other person than the treasurer of school board. This was the law in force up to 1877, and is that by which the rights of these parties are to be tested. Subsequent legislation in 1877, making the parish treasurer *ex-officio* treasurer of the school board, can not retroact so as to legalize the payments made in 1875. The collector was bound to await the appointment of another school treasurer if there was none, or to compel the reception of the money by him if there was one. His refusal to receive the funds could not justify the defendant in paying to one not only not authorized but forbidden to receive. We hold, therefore, that payment to the parish treasurer did not discharge defendant, and that he must account to the school board, which has, we think, undoubted right to require it.

Second. The evidence satisfies us that the defendant in good faith paid over the fund to the parish treasurer, and that the police jury approved and accepted that settlement, and that the people of the par-

## Board of School Directors vs. Delahoussaye.

ish have profited by it. The money thus paid is either yet in the parish treasury, or it has been disbursed for the use of the parish. "He who receives what is not due to him, whether he receives it through error, or knowingly, obliges himself to restore it to him from whom he unduly received it." C. C. (old) 2279. Equity and good conscience forbid that the parish should thus enrich itself at the expense of defendant, who acted in this matter erroneously, but honestly. The parish should protect him, and promptly re-imburse to him or the school fund the amount thus unduly received.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and it is now decreed that the plaintiff do recover of the defendant, Onezephore Delahoussaye, the sum of \$1971 46, with legal interest thereon from September 13, 1875, till paid, and costs; said sum to be paid to the treasurer of the school funds of the parish of St. Martin; and it is further decreed that the said defendant do have and recover from the parish of St. Martin the like sum (\$1971 46), with like interest from same date, together with all costs of this suit.

## No. 1005.

## A. A. GUILBEAU, TUTOR, ET AL. VS. TRÉVILLE THIBODEAU ET AL.

An action to set aside a sale of real estate made by its deceased owner, on the ground of simulation, may be brought by the executor and forced heirs collectively, or by the heirs separately.

The forced heirs of a deceased person, whose *legitime* is impaired by an alleged simulated sale made by the deceased, are not estopped from attacking the sale on the ground of simulation, but they can only annul the simulated sale to the extent that they are *forced* heirs.

The action against the vendee to annul a simulated sale is not prescriptible.

The amendment to an answer which substantially changes the defense will not be permitted.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu, J.*

*Mouton & DeBaillou* for plaintiffs and appellees.

*Felix Voorhies* for defendants and appellants.

The opinion of the court on the original hearing was delivered by DEBLANC, J., and on the rehearing by SPENCER, J.

DEBLANC, J. In 1867, on the thirteenth of August, Louis Alexander Potier appeared before a notary public, and signed an act in and by which he acknowledged to have sold to Tréville Thibodeau his plantation and some cattle, for the price of five thousand five hundred dollars. He died shortly after, leaving a testament made on the nineteenth

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1119	690

of September 1866, and—by that testament—gave nearly all he owned to the grandchildren of his aforesaid vendee.

In this suit, plaintiffs—as forced heirs of Potier—attack, as being a simulation, the alleged sale of the 13th of August 1867, the only object of which—they charge—was to deprive them of their *légitime*.

Their action is resisted by defendants on the grounds :

1. That this suit being one in revindication of immovable property could have been brought but by the executor of the last will of Potier, and not by his heirs. In substance and in terms, plaintiffs' action is one "*en déclaration de simulation*," and that it could have been brought by the executor and forced heirs collectively or by the heirs separately, there can be no doubt.

5 A. 578 ; 6 A. 223, 673 ; 15 A. 579, 700, 641 ; 5 M. 145 ; 9 M. 351 ; 2 L. R. 81 ; 17 L. 118 ; 4 A. 500 ; 20 A. 209.

2. That plaintiffs are the heirs of Potier and can not be heard to allege his turpitude. In that capacity, they here claim—not merely as the legal representatives of their ancestor, but from the law ; and if they were not allowed to prove a simulation perpetrated to deprive them of their *légitime*, it would not be a difficult task to disinherit them.

15 A. 700 ; 12 A. 759.

3. That plaintiffs' action is barred by the prescription of five years. If—as contended—the sale from Potier to Thibodeau was a simulation, Thibodeau had—not only no just title to the property apparently transferred, but no title at all, and it is evident that one whose possession springs from and is linked to a simulation to which he is a party, can not acquire by prescription.

The amended answer presented by Flaville Thibodeau was properly rejected by the lower court. In the original one he, as Tréville Thibodeau, avers—in the most positive terms—that the act of the 13th of August 1867 evidences a real and valid sale, and—in his proposed amendment—he avers that said act, which has the form of a sale, which he himself continues to call a sale, was meant as a donation *inter vivos* from Potier to the grandchildren of Tréville Thibodeau.

The only question which now remains to be determined is one of fact : is the sale of the 13th of August 1867, from L. A. Potier to Tréville Thibodeau, a simulation ? That it is a simulation can not be successfully disputed : the pretended vendor did not sell, nor intend to sell, the pretended vendee did not buy and no price was paid : the manifest and avowed purpose of the parties was to accomplish—by that act—more than the deceased ancestor could have accomplished by his last will, and that was to disinherit the plaintiffs.

In only one respect the judgment of the lower court is incorrect and must be amended : the property comprised in the simulated act should



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Guilbeau vs. Thibodeau.

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not have been decreed to belong to the heirs of L. A. Potier, but to his succession. The deceased could dispose and—it appears—has disposed of a portion of said property, and those who may have acquired rights under his will should not be concluded.

It is useless to examine the other and many defences suggested by the vigilant ingenuity and marked ability of respondents' counsel. Those untenable defences have—for upwards of five years—upheld an attempted injustice and delayed the recognition and enforcement of a plain and incontrovertible right. That is long enough.

It is, therefore, ordered, adjudged and decreed that, in so far as it declares "*that the property in question is that of the heirs of Louis Alexander Potier,*" the judgment of the lower court is reversed.

It is further ordered, adjudged and decreed that the act of sale from Louis Alexander Potier to Tréville Thibodeau, passed before Omer Martin, a notary public of the parish of St. Martin, on the 18th of August 1867, be and the same is hereby declared simulated and void, and that the property therein described belongs to the succession of said Potier.

It is further ordered, adjudged and decreed that—as amended—the judgment of the lower court is affirmed; the costs of the appeal to be paid by respondents.

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## ON APPLICATION FOR A REHEARING.

SPENCER, J. We are satisfied that the sale from Potier to Tréville Thibodeau is simulated, and that it is without effect as to the forced heirs.

But a reconsideration of the question has led us to the conclusion that the plaintiffs can only annul said sale to the extent that they are forced heirs of their grandfather Potier. That beyond that limit they occupy the position of ordinary heirs, and are estopped by the deed of their ancestor, in the absence of a counter letter. See *Maple vs. Mitty*, 12 A. 759; 4 A. 500, and cases cited.

We think, therefore, that our former decree went too far; and that said sale should only be overruled and set aside to the extent of the fraction thereof for which said plaintiffs are forced heirs. But as the record does not enable us to fix with certainty the fraction for which plaintiffs are forced heirs, the case ought to be remanded to fix it. The rehearing is granted.

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## ON REHEARING.

For the reasons above assigned it is ordered and decreed that the decrees heretofore rendered by the court below and by this be amended

so as to read as follows: It is therefore ordered, adjudged, and decreed that the sale and transfer from L. A. Potler to Treville Thibodeau, of date August 13, 1867, be and the same is hereby annulled and avoided, in so far as and to the extent that it affects the *légitimes* of the plaintiffs in this case, and that the said plaintiffs be decreed owners of the property so transferred to the extent of the fraction for which they are forced heirs of their said grandfather, and that this case be remanded for the sole purpose of ascertaining and fixing that fraction.

It is further ordered that appellees pay costs of appeal, and appellants those of the court below.

Mr. Justice DEBLANC adheres to the original opinion in this case.

No. 1012.

STATE EX REL. VALERY COCE VS. J. A. CHARGOIS.

A district attorney who is a practicing lawyer, is qualified to act as judge *ad hoc* in the trial of a civil case in which the judge is recused.

A lawyer who having accepted the appointment of judge *ad hoc* to try a case, and entered on the trial, afterward refuses to go on with the trial, can not be compelled by mandamus to proceed with the case.

# APPLICATION for a mandamus.

*Jas. A. Chargois* for defendant.

*John Clegg* for relator.

The opinion of the court was delivered by

MANNING, C. J. A suit was instituted by the relator in the District Court for Lafayette, in which the judge of that court was recused. He therefore called on a practicing lawyer to try the case as judge *ad hoc*, who immediately qualified, and subsequently made sundry orders in the cause. The lawyer thus appointed is the respondent, who is the District attorney for that district. He fixed the cause for trial, but at the time appointed for trial, he recused himself, or was recused, because he was District attorney, and refused to proceed farther. Thereupon the relator applied to us for a mandamus, and upon a rule issuing to shew cause why it should not be granted peremptorily, he assigns for cause:

1. That he is already district attorney, and therefore can not be judge *ad hoc*, because he can not hold two offices of honor or profit at the same time.

This objection is not good. A practising lawyer who is selected to try a particular case, and who acts as judge merely *pro hac vice*, can not be said to hold an office. And he certainly does not hold one of trust or profit. His functions cease the instant the case is at an end, and are

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State ex rel. Coce vs. Charcois.

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confined to a particular case. There can be no reason why in civil cases the prosecuting officer for the criminal docket should not try a case in which the judge is recused, provided he be a lawyer.

2. The respondent urges that the rightfulness of his recusation can not be inquired into by mandamus, but the party aggrieved should appeal.

If we were to hold that a judge *ad hoc* was an officer, whose failure or refusal to perform his duty could be taken cognisance of by us, in the same way and to the same extent that a judge of one of the inferior courts can, we should certainly issue the mandamus. In other words, if the respondent is right in recusing himself, on the theory that it is another office and he can not hold two offices at the same time, then we might issue the mandamus to him as an inferior judge.

But we refuse the writ on other grounds, viz because of the want of power in this court to compel a lawyer to try a case as judge if he chooses to refuse. The attorney who may be appointed is not obliged to accept the appointment. If he does accept, and even enters upon the trial of the case, he is not obliged to continue to the end. And what he is not obliged to do, we can not compel him to do. True, it is almost *contra bonos mores* to accept, qualify, sit, make orders, and then from caprice, or weariness, or other like cause, incontinently quit the bench, but we are without power to make him go back.

We believe in the present case it was not caprice, but a belief in the incompatibility of the two offices, that occasioned the respondent's action. State ex rel. Fuqua vs. Brame, 29 Annual, 816.

The mandamus is refused at the cost of the relator.

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No. 1002.

STATE EX REL. THOMAS W. NELSON VS. ALEXANDER V. FOURNET,  
ASSESSOR, ET AL.

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A party can not be compelled to appear and answer to a suit brought against him in any other district court but that of the parish of his domicile.

A mandamus will not issue to compel the parish assessor, and tax collector to assess a tax. Only the police jury of a parish have power to levy a tax.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin.  
Fontelieu, J.

*Breaux, Fenner & Hall* for relator and appellant.

*G. A. Fournet* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. In the case of Nelson vs. parish of St. Martin, plaintiff obtained judgment against said parish on November 29, 1873, for \$4500

and interest, and ordering "the board of assessors, or officers whose duty it is to assess taxes, forthwith to assess a parish tax at a sufficient rate per cent upon the assessment roll of the current year to pay said judgment, and that the tax collector proceed forthwith to collect said tax, etc." On December 27, 1877, Nelson presented his petition "to the judge of the third judicial district court in and for parish of St. Martin," reciting the above-mentioned judgment, and averring that the proper officers of St. Martin had neglected and refused to levy and collect the tax, as therein directed. Wherefore he prays that the parish assessor and tax collector of St. Martin be cited to appear at the court in the town of New Iberia, in the parish of Iberia, there to show cause, on January 2, 1878, why a mandamus should not be made peremptory, directing them to assess and collect a tax as directed by said judgment, etc.

The assessor and collector appeared at New Iberia and filed numerous exceptions and defenses, among which it will only be necessary to notice two.

1. They except that they are citizens and officers of St. Martin, and that the proceeding against them is addressed to the district court of St. Martin, and that they can not be cited and required to appear and answer in the parish of Iberia.

2. That they are without capacity to stand in judgment, for the reason that it is no part of their duty or of either of them to assess and levy parish taxes, that duty belonging exclusively to the police jury. The collector averring that he has no authority to collect until taxes have been legally imposed. We think both these exceptions well taken.

There is no law or authority authorizing the judge of the third district court in and for parish of St. Martin to compel parties to suits pending in that court to appear before him in another parish. The proceeding was *coram non judice*, and void.

It is equally fatal to relator's proceeding that he has not taken it against the necessary parties. The duty of the parish assessor is to list and value property, not "to assess taxes" thereon. The police jury should have been cited as the only "officers whose duty it is to assess taxes."

It is unnecessary to pass upon the constitutional questions raised as to the power of the Legislature, in a case like this, to repeal the law authorizing the levy of a tax to pay judgments, after such judgments have been rendered.

For the reasons now stated the judgment appealed from is affirmed at costs of relator.

Mr. Justice DEBLANC is recused in this case.

No. 994.

MAYOR ET AL. OF BREAU'S BRIDGE VS. VALÉRIEN DUPUIS.

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Where the charter of a municipal corporation requires the mayor's sanction to all the enactments of the Board of Selectmen, such enactments will be inoperative unless signed by the mayor.

The promulgation of an ordinance enacted by the Board of Selectmen of Breaux's Bridge, by merely posting the ordinance, is without effect, when the ordinance has not been signed by the mayor, and by the secretary of the board.

No law or ordinance passed by a town council can have any binding effect unless promulgated and preserved in the English language.

When the fact is denied that a certain ordinance has been enacted by a town council, the fact can only be proved by the deliberations of the council, and their promulgation, duly attested.

**A** PPEAL from the Parish Court of St. Martin. *Bassett, J.*

*F. Voorhies* for plaintiffs and appellees.

*Mouton & DeBaillou* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. This suit is brought to recover from the defendant the sum of fifty dollars, which plaintiffs claim by virtue of an ordinance adopted by the Town Council of Breaux's Bridge, on the 3d of December 1877. That ordinance was written, presented, promulgated and preserved in the French language, and is not signed by the mayor.

The tenth Section of the act amending the incorporation of the town of Breaux's Bridge provides "that the mayor shall *sanction* all laws and ordinances passed by the Board of Selectmen." That sanction must be expressed otherwise than by suing to recover the amount of a license imposed by said laws and ordinances, *which are not published in any official paper*, but merely placarded in different parts of the town. The council's enactments and their promulgation must bear the signatures of the Mayor of the Town and of the Secretary of the Board. Without at least one of the signatures of those two officers, no one could be legally informed of the adoption of those enactments, and—without both of them—the promulgation by mere posting was a vain formality.

In this instance, to prove a fact which must be shown by the book to be kept by the Secretary, he had to be called and examined as a witness, and testified that two of the members of the Board have voted for the ordinance. When denied, such a fact can be established but by the deliberations of the Board and their promulgation duly attested by the signatures of the mayor and secretary.

The Council's ordinance imposing the license sought to be recovered is a law, a legislative proceeding, and—though its promulgation in the language understood and spoken in the locality wherein it was

adopted was proper *and authorized*, the 109th article of the Constitution of 1868, which differs from Sect 15 of title VI of the State Constitution of 1812, commands that all laws and legislative proceedings shall be promulgated and preserved in the English language.

In the case of *Loze vs Mayor* reported in the 3d La and relied upon by the counsel representing plaintiffs, this court held that only the laws passed by the Legislature of the State were to be promulgated in the English language. That decision was certainly correct, as then such a promulgation was limited by the Constitution to "all laws that may be passed by the Legislature."

That plain provision of the Constitution of 1812 has been intentionally changed by as plain a provision of the Constitution of 1868, and now—unless promulgated and preserved in the English language—no law or ordinance, whether passed by the Legislature or a Town council—can have any binding effect.

C. of 1868, art 109.

It is therefore ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and plaintiffs' demand rejected with costs in both courts.

#### No. 1031.

JACOB C. VAN WICKLE VS. O. H. VIOLET AND WIFE.

It will be presumed that the community of acquets and gains exists between the husband and wife until the contrary is shown.

Neither the wife nor her separate property can be held liable for supplies furnished to her husband for the cultivation of her plantation, unless it be proved that the wife herself cultivated her plantation, or that it was cultivated for her account and benefit. The mere fact that the creditor kept the account for the supplies against the husband as agent of the wife, does not prove the agency.

**A** PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

*E. Simon and James M. Moore* for plaintiff and appellant.

*Garland & Dupré* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. This is a suit against husband and wife, on a note drawn by them jointly to their own order, and by them indorsed, secured by mortgage of the same date, March 7, 1872.

The petition charges that the wife was separated in property from her husband by judgment; but when this was rendered, or in what court, there is nothing in the record to show.

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Default was taken against Violet. Mrs. Violet, after denying all the allegations of plaintiff's petition, except that she signed the note sued on, specially denied her liability for the amount of the note, as it was given to secure advances made and to be made to her husband; and she also denies her liability on the mortgage granted to secure the note, alleging that the property mortgaged is paraphernal, and was owned by her before her marriage.

The evidence consists of the note and mortgage, the deposition of Mouton, the mortgagee, and the testimony of Félix Dessan, the father of Mrs. Violet, who proves that Violet had no means, to his knowledge.

Mouton testified that the note and mortgage were given to secure advances made and to be made for the plantation of Mrs. Violet; and that all his dealing was with Violet as agent of his wife. He attached to his deposition an account current, kept in the name of "O. H. Violet, agent," beginning May 29, 1871, footing on the debit side \$2100 55, credits \$1117 11, balance brought down to May 31, 1873, \$983 44, with memorandum at the foot, "Hold your mortgage for \$1000, as collateral security."

The judge of the district court was of opinion that the evidence was not sufficient to charge Mrs. Violet; and we are of the same opinion.

The R. C. C., 2398, declares that "the wife, whether separated in property by contract or by judgment, or not separated, can not bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

The answer of Mrs. Violet puts at issue all the allegations of the petition except that she signed the note. The legal presumption is that community exists in all cases, where it is not excluded by contract, or dissolved by judgment; and it is also a legal presumption that all debts contracted during the marriage are debts of the community, for which the wife is forbidden to bind herself or her property.

The fact that Mouton dealt with Violet as agent for his wife by no means proves that he actually was her agent, or that he had authority to bind her. The paraphernal lands of the wife might be cultivated by the husband for his account, or for account of the community; and in neither case would the wife be liable for expenses and debts incurred.

In order to recover of the wife there must be proof that the consideration inured to her separate benefit. *Conrad vs. LeBlanc*, 29 An. 124, and cases there cited. It is not proven that Mrs. Violet cultivated any plantation, or that any was cultivated for her account and benefit.

There is nothing in the record to rebut the presumption that community existed between Violet and his wife; and that the debt is one for which she is forbidden by law to bind herself or her property.

The judgment appealed from is therefore affirmed with costs.

## A. TERTROU VS. C. C. DURAND ET AL.

The purchaser at public sale of succession property on which he has a first special mortgage, is entitled to retain possession of the purchase price, on executing his bond with solvent security in favor of the administrator, for a sum to be fixed by the court, conditioned that he shall pay such sums as may be ascertained, on a settlement of the succession, to be payable by preference to him out of the proceeds of the property so purchased by him, up to the amount of his bid.

The institution of executory proceedings on a mortgage note will interrupt prescription of the note, unless the proceedings are dismissed on motion of the plaintiff.

**A** PPEAL from the Parish Court of St. Martin. *Bassett, J.*

*J. A. Breaux and L. J. Gary* for plaintiff and appellee.

*F. & M. Voorhies and E. Simon* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. This case was before us last year, and is reported at page 506, 29 An., where the objects and purposes of the suit are fully stated, and need not be here repeated. The case was then remanded, and is now before us after having been tried, resulting in a judgment for plaintiff, from which this appeal is taken.

The evidence shows that Tertrou is the holder of two special mortgages on the property sold, to wit: that in favor of LeBlanc, for \$2816, and that in his own favor for about \$16,879 60. These are the first special, and, so far as appears, the only special mortgages, on the property. At the probate sale of the succession of Charles Durand, Jr., certain lots (described by plaintiff) of the property subject to his mortgages were adjudicated to Tertrou for \$10,134. The sheriff and C. C. Durand, administrator, demanded of him, *eo instanti*, the full amount of his bid, in cash. He claimed the right, as first special mortgage creditor, to retain the amount of his bid until the final liquidation and settlement of the estate, upon giving security for such amount as might be fixed as preferred to him. The sheriff, thereupon, at once re-offered the property, without delay, and the same was purchased by C. C. Durand, the administrator, and John Durand, heirs of the deceased, for the sum of \$2200. Under the view we have taken, this second adjudication is void. Tertrou was entitled to retain the amount of his bid until the amount of claims preferred to his, and exigible out of the property, was ascertained. There is a large amount of property which has not been sold, and which may, perhaps, suffice to satisfy all antecedent privileges and general mortgages. The defendants have pleaded the prescription of five years against the Tertrou claim. It is admitted that Tertrou, in July, 1872, took executory process on his notes and mortgage, which was duly



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 Tertrou vs. Durand.
 

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served on the administrator. This process was enjoined, and it is said that Tertrou voluntarily dismissed and abandoned it. We find that the order of dismissal of date May 29, 1877, was rendered on motion of C. C. Durand, administrator, and not on motion of Tertrou. This executory proceeding and the injunction during its pendency interrupted prescription, and it began to run *de novo* only from that date. The plea of prescription is, therefore, not sustained.

We think the judgment appealed from is correct, except that it should have fixed the amount and conditions of the bond to be given by Tertrou. It should be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, as follows: that before the sheriff delivers the deed and possession of said lands to Tertrou, and as condition precedent thereto, the said Tertrou shall execute, with good and sufficient security, in favor of the administrator of estate Charles Durand, Jr., his bond in the sum of seven thousand five hundred dollars, conditioned that he will pay and satisfy such sums as may be fixed and ascertained on settlement of said estate to be payable by preference to him out of the proceeds of the lands so purchased by him up to the amount of his bid, said bond to be approved by the parish judge of the parish of St. Martin.

It is further ordered that, as thus amended, said judgment be affirmed. The costs of appeal to be paid by appellee.

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 No. 1009.

## URSULE BROUSSARD VS. LEO DITCH AND SHERIFF.

When a succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed; and if appointed, a sale provoked by him of the property may be enjoined by the surviving spouse.

**A** PPEAL from the Parish Court of Vermilion. *Kibbe, J.*

*R. P. O'Bryan* for plaintiff and appellant.

*F. R. King* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. Leo Ditch the elder, husband of the plaintiff, died in 1867, leaving several minor children, of whom his widow, their mother, qualified as natural tutrix. His property was inconsiderable—about twelve hundred dollars in value—and was all community, and all movable, and he owed no debts. The plaintiff qualified as natural tutrix to her children, and has not married again.

Leo, the eldest child, attained majority two or three years ago, and applied for administration of his father's estate. Opposition was made to it by his mother, the surviving widow in usufruct and natural tutrix of the other children, upon various grounds, one of which is that there was no necessity for an administrator to be appointed, since she in her capacity of tutrix was doing, or had done, all that was necessary to be done by any representative of the succession. Nevertheless her opposition was rejected, and the applicant was appointed, and she has brought her appeal from that judgment before us in another case.

The administrator, thus appointed, applied for and obtained from the parish court an order of sale of the whole property, and the widow enjoined the sale thus ordered. That is the present suit.

What possible grounds can be supposed to exist to justify an order of sale of property thus owned and situated, we are at a loss to conjecture. The father had been dead nearly, if not quite, ten years when the application for administration was made. No creditor asked for an administration, for there were none. The property was in the possession of the widow, who owned absolutely one half of it, and who as usufructuary was entitled to the possession of the other half. A sale of her moiety, under the circumstances developed in this case, would have conveyed no title. A sale of the children's moiety would have imperilled their scanty heritage. What that heritage was, and how acquired, the widow herself shall tell, as on the witness stand she confronted the first fruit of her womb, who was seeking to despoil her of her only support;

"Leo Ditch jr. is my son, issue of my marriage with Leo Ditch Sr.

\* \* \* We were married, Leo Ditch and I, twenty-five years ago last January. He died of yellow fever in Oct. 1867. The only property he left at his death was cattle, four jars, one spinning wheel, one shot gun and one mattress. I was told that he branded thirty calves the year of his death. I sold the calves every year to support and maintain the children, also some old cows and a very few beeves. I never kept any account of the number. Leo Ditch can say better than I can, for he is the one who always sold them for me, except the last year. I can not say whether there were any debts due my husband or not at the time of his death. I can not say either, whether my husband owed any thing or not when he died. He had nothing but his clothing when we married, and not much of that."

On cross-examination she says she spent the money realized by the sale of the cattle in support of the children, such as their food, schooling, books, medicines and doctor's bills. She owned at the time of her marriage six cows, a branding iron, and ten dollars in specie, and with the memory for small matters that characterizes those in her lowly condition, and the *naïveté* that is both a consequence and an evidence of the

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Broussard vs. Ditch and Sheriff.

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frank simplicity of her nature, she says that she gave the specie to her young husband who bought a cow with it.

As he had nothing, the whole of the stock must have been the issue of the six belonging to his wife, the one bought with her money, and those bought subsequently with the profits, if any were thus bought.

The case resembles that of *Burton v. Brugier*, recently decided by us, *anté*, 478, and the principle of law controlling it is well established. When the succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed, and if appointed, a sale provoked by him of the property is properly prevented by an injunction by the owner and usufructuary. In that case, damages were awarded the widow against a purchaser of the property under circumstances very like these, who had evicted her by violence. The arrest of the sale by the process used in this suit has probably saved another purchaser from a similar fate. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and the injunction sued out by the plaintiff is maintained and perpetuated, it is further adjudged that she have and recover of the defendant Leo Ditch the costs of both courts.

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ON APPLICATION FOR REHEARING.

MARR, J. Counsel for appellees bases his application for rehearing mainly on the ground that our decree disposes of the case on the merits; whereas the judgment appealed from was rendered on exception to the jurisdiction of the parish court *ratione materiae*.

The parish court erred in maintaining this exception. That court had granted an order of sale, at the instance of Leo Ditch, in his capacity as administrator; and no other court had jurisdiction to enjoin that sale.

We have decided that Leo Ditch is not administrator; and he can not proceed with the sale. There is no issue of law or of fact upon which the order of sale enjoined in this case could be enforced or justified; and as the parish court had jurisdiction to grant the injunction, there is nothing now to be tried and the injunction is perpetuated, *ex necessitate*.

The rehearing is refused.

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State ex rel. Merchant vs. Daspit.

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No. 1030.

STATE EX REL. MERCHANT VS. TAYLOR DASPIT ET AL.

Where a tax collector is superseded, and his successor collects part of the taxes embraced in the tax rolls, and blank licenses put into his hands, the outgoing collector and his sureties will be liable only for the amount collected by him, and not accounted for; which amount must be proved by the State.

An attorney in fact can not bind his principal as surety, unless he is specifically authorized to do it.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu, J.*

*W. B. Merchant* for plaintiff and appellee.

*E. Simon, J. E. Mouton, L. J. Gary, and G. A. Fournet* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. This is a suit to recover of Taylor Daspit, tax collector of the parish of St. Martin, \$22,356 88, for alleged defalcations; and against his sureties, Joseph Gautreau and Mrs. Marie Amélie Béraud, and Louis Laloire, her husband, \$20,000, on the bond in which Gautreau and Mrs. Laloire were sureties, each for \$10,000.

Daspit was appointed tax collector for the parish of St. Martin, in March, 1875. He gave bond, with Joseph Gautreau and Mrs. Laloire as sureties, each in the sum of \$10,000. He collected the taxes of 1870, 1871, 1872, 1873, 1874; and, as Jumel, Auditor, testifies, "he paid the same into the treasury, and his accounts appear upon the books as settled."

The rolls for 1875, for taxes assessed, and licenses furnished him, amounting to \$22,356 88, were placed in his hands; and the object of this suit is to make him and his sureties liable upon the ground that he failed to account for any part of this amount.

The proof shows that on the sixth April, 1876, Numa Bienvenu was appointed tax collector for St. Martin; and that he collected the greater part of the taxes for 1875.

We think that where a tax collector continues in office, no proof of defalcation on his part is necessary beyond the tax rolls and licenses placed in his hands; and that he is bound to account; and in default of his accounting he will be legally liable for the whole amount. But it is manifest that where the tax collector is superseded, and his successor collects part of the taxes, the outgoing collector and his sureties are liable only for the amount collected by him and not accounted for; and the tax rolls, and blank licenses put in his hands would not be sufficient evidence either against him or his sureties.

It appears from the testimony of Jumel, the Auditor, that Bienvenu, the successor of Daspit, filed affidavits with the Auditor, showing

that Daspit collected part of the taxes of 1875, in all \$8102 38. But this is merely Jumel's statement of what the affidavits of Bienvenu were; and this is mere hearsay. Bienvenu should have been called as a witness.

In 1870, Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, and her brother, Felix Béraud, and her sister, Eugénie Amelia Béraud, gave to Louis E. Laloire a power of attorney which is quite full. It does not, however, contain any power or authority to the attorney to bind his constituents as sureties, for any purpose whatever.

Under this power, Laloire signed his wife's name, five years after its date, to the official bond of Daspit as tax collector. It was a gross abuse of the power, and of the trust and confidence reposed in the husband by the wife. It could not have entered into the contemplation of the parties, in 1870, that the power then granted, evidently to enable the husband to manage his wife's business and for her interest, would authorize him to bind her as security for others, especially for a tax collector appointed in 1875, five years after the date of the power.

Mrs. Laloire was not one of the sureties for Daspit in his official bond; and she should not have been accepted as such.

The judgment of the district court was in favor of the State, against Daspit, for \$22,356 88, subject to a credit of \$3310 35, of the taxes of 1875, proven not to have been collected; and against Joseph Gautreau and Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, each for ten thousand dollars, with recognition of mortgage on their real estate, from the date of the bond, March 16, 1875: and all the defendants appealed.

As we have seen, the legal presumption which would have existed against the tax collector that he was bound for the whole of the tax rolls and blank licenses furnished to him can not be invoked in this case. The taxes of 1870, 1871, 1872, 1873, 1874, collected by Daspit, were fully accounted for. The taxes of 1875 were collectible in 1876; and on the sixth April, 1876, Bienvenu was appointed the successor of Daspit: so that it was impossible for Daspit in his official capacity to have collected the taxes of 1875.

As the State had deprived him of the legal right and power to collect the taxes, by appointing a successor, it was incumbent on the State to show, by proof, the amount of taxes collected by him. The only proof on that subject is the Auditor's testimony of what is shown by affidavits of Bienvenu, the successor of Daspit, part of the records of the Auditor's office, neither the originals nor copies of which were produced. The State should have called Bienvenu and the taxpayers, as witnesses to prove the amount of taxes collected by Daspit up to the sixth April, 1876, in order to have held the sureties in his official bond,

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 State ex rel. Merchant vs. Daspit.
 

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or the sums collected by him after the appointment of his successor, not accounted for by him, to have recovered of him alone.

The district court should have released Mrs. Laloire from liability, because she was not one of the sureties on the official bond of Daspit ; and there should have been judgment of nonsuit against the State, and in favor of Daspit and Gautreau.

It is therefore ordered, adjudged, and decreed that the judgment of the district court appealed from be annulled, avoided, and reversed : and proceeding to render such judgment as should have been rendered by the district court, it is further ordered, adjudged, and decreed that there be final judgment against the State, in favor of Mrs. Marie Amélie Béraud, wife of Louis E. Laloire, rejecting the demand against her ; and that there be judgment against the State, in favor of Taylor Daspit and Joseph Gautreau, dismissing the demand against them respectively as in case of nonsuit, with costs in both courts.

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 No. 1010.

## QUEYRONZE &amp; BOIS ET AL. VS. P. E. THIBODEAUX ET AL.

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In an action to annul a *dation en paiement* of certain property worth more than \$500 the district court has jurisdiction, although the debt due the creditor who sues to annul is less than \$500.

A *dation en paiement* of property unaccompanied by its delivery, is void.

A *dation en paiement* made by a father to his children, by which he divests himself of all means of support, is void.

A *dation en paiement* made by a debtor which leaves him nothing with which to pay his other debts, thus making him insolvent, is void.

The action to annul a *dation en paiement* which was simulated, and thus void *ab initio*, is not subject to the prescription applicable to the dispositions of property that are real, but fraudulent as to creditors.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu, J.*

*Mouton & Martin* for plaintiffs and appellees.

*L. J. Gary* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. . In August, 1876, Queyrrouze & Bois obtained judgment in the parish court of St. Martin, against O. E. and Paul E. Thibodeaux, *in solido*, for \$383 04 with interest and costs ; and in May, 1877, Bodet & Gueydan Bros. obtained judgment in the district court of the same parish, against the same parties, for \$729 96, with interest and costs.

These creditors, and Larose, a creditor by open account, brought suit in the district court of St. Martin, against Paul E. Thibodeaux personally, and as tutor of his minor children, and against other persons

his children either of age or emancipated by marriage, to have declared null a certain *dation en paiement* made by him to his children, by notarial act of date 12 January, 1874: and to subject the property given in payment to their respective judgments and claims.

The petition charges, substantially, that Thibodeaux was indebted to Queyrrouze & Bois for merchandise sold to the commercial firm of which he was a partner from January to June, 1873: to Larose for merchandise sold 29 January, 1873; and to Bodet & Gueydan Bros. for merchandise sold during the year 1873:

That Thibodeaux "pretends to have sold and did pass an act of sale by *dation en paiement*, to his minor children," for the sum of \$1800, all his property, movable and immovable, consisting of several tracts of land, domestic animals, etc.:

That this pretended *dation* was made and effected by fraud and collusion, for the purpose of defrauding petitioners: That it is null and void, for the reason that no previous inventory or appraisement of the property had been made: That the parties appearing as purchasers were, and some of them still are minors, not emancipated; and all such contracts are null and void *ab initio*.

That since said pretended *dation* Thibodeaux has continued to be and is still in the undisputed possession of the property, the value of which far exceeds the price mentioned. Various other causes of nullity are set up, among others, the incapacity of the tutor to contract with the minors: the failure of Thibodeaux to have the rights of the minors fixed, by administration of the succession of their mother; and the want of consideration.

The prayer is that the pretended *dation en paiement* be declared to have been made in fraud of the rights of petitioners, and to be null and void *ab initio*.

Defendants answered by general denial; and they afterward pleaded the prescription of one and three years, in bar of plaintiffs' action.

The judge of the district court was of opinion that the claim of Larose was subject to the prescription of three years, and was barred. The decree was that the *dation* be avoided and annulled, in so far as regards the judgment claims of Bodet & Gueydan Bros., and Queyrrouze & Bois: and the defendants appealed.

Our attention is called to the fact that the demands of Larose, and Queyrrouze & Bois are, each, for less than \$500; and it is urged that the district court was without jurisdiction as to them. This would be true if the object of the suit had been to recover of defendants the amount of these claims: but plaintiffs had no such object; and they prayed for no other judgment than one declaring the nullity of the *dation*. The amount in dispute was the value of the property.

The claim of Larose may be prescribed ; but the plea of prescription in this case was against the action of plaintiffs ; and that action was not to recover the money due them ; but for the nullity of the dation.

It was proven that Thibodeaux continued to live in the same house, and with all his children, as before the dation ; so that there was no apparent change of possession. The mere description of the property, aggregating 436 superficial arpents, one of the tracts, at least, cultivated as a plantation, fronting on the Teche, to say nothing of the buildings, fences, agricultural implements, horned cattle, horses, colts, mules, hogs, leaves no doubt of the insignificance of the price ; and it can not be considered as real or serious. Four of the children were minors at the time the dation was made, and two were married women. The act provides that the property shall remain in common, *en communauté*, until the majority of the minors, one of whom is now about thirteen years of age.

There is room for grave doubt as to the reality of the indebtedness of Thibodeaux to his children ; and this doubt is increased by the fact that there has been no administration of the succession of their deceased mother, no inventory, no proceedings establishing any indebtedness of their father to them.

The law forbids the giving in payment, by an insolvent, to one creditor to the prejudice of others, any other thing than the sum of money due ; and the proof in this case is that Thibodeaux, by this dation attempted and intended to vest in his children a title to all that he had, reserving nothing whatever to himself. Living in the house with his family, all his children, himself the head of the family, a mere paper conveyance would not be such a delivery as is indispensable to the giving in payment ; and the stipulation that the entire property should remain in common until the majority of the minors indicates clearly his intention to divest himself of the title and control nominally only, while in reality he would enjoy the benefits of actual ownership, and keep his family with him as he has continued to do. We entertain no doubt that this dation was a pure simulation : that it was void for want of delivery : R. C. C. 2656 : that it was also void, because the effect, if it had been real, would have been to divest the father, the head of the family, of the means of support, it would not have left him a bed or a chair : that it was void because he retained nothing with which to pay his debts, and it made him insolvent ; and that the action to have it declared void *ab initio*, as it really was, is not subject to the prescription applicable to conveyances and dispositions of property, real but fraudulent as to creditors.

The rights of the children of Paul E. Thibodeaux, such as they existed prior and up to the date of the *dation en paiement*, 12 January, 1874, will be in no manner affected by this decree, and are reserved just



Queyrrouze &amp; Bois vs. Thibodeaux.

as they were at that time and as they would have been if no such dation had been made.

For the reasons herein stated, the judgment appealed from is affirmed with costs.

No. 999.

EDWARD FOREMAN VS. W. G. SAXON ET AL.

A wife, even separate in property, is incapable of either buying or selling property, unless her husband concurs in the act, or yields his consent in writing. The record of a written agreement to sell certain property does not amount to a sale of the property.

**A** PPEAL from the Third Judicial District Court, parish of St. Mary. *Fontelieu, J.*

*M. J. Foster* and *D. Caffery* for plaintiff and appellee.

*Fred. Gates* for defendants and appellants.

The opinion of the court was delivered by .

MARR, J. Mrs. Pecot, the owner of a plantation, the legal title to which stood in her name, agreed to transfer one undivided third of it to Mrs. Mallon, in consideration of the abandonment by Mrs. Mallon of certain suits and claims affecting the property. This agreement was dated April 8, 1876, and was recorded on the eighth March, 1877.

Mrs. Mallon transferred her interest in this, and certain other property, to Edward Foreman, for the price of \$3000; and this transfer was recorded on the seventh March, 1877, the day after its date.

Mrs. Pecot, by notarial act, reciting the agreement between herself and Mrs. Mallon, and the performance by Mrs. Mallon of her part of that agreement, conveyed to Edward Foreman, assignee of Mrs. Mallon, one third of the plantation, fixed and designated by metes and bounds; and this title was recorded on the twenty-first March, 1877, the day after its date.

On the fifth March, 1877, W. G. Saxon caused to be recorded a decree of this court, rendered in June, 1874, in the suit of Mallon and wife vs. Gates, condemning Mrs. Mallon and her sureties to pay to Gates \$500 in damages for the wrongful obtaining of an injunction. Saxon was one of the sureties; and on the ninth March, 1877, he caused execution to issue against Mrs. Mallon, on this decree, in his favor as subrogee of Gates, under which the sheriff seized and advertised for sale the one third of the plantation acquired by Mrs. Mallon under the agreement of April 8, 1876.

Foreman enjoined the sale, claiming to be the owner, in virtue of the transfer to him by Mrs. Mallon, and the subsequent conveyance by Mrs. Pecot. The district judge was of the opinion that the recording of the

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decree of this court, on the fifth March, 1877, created a judicial mortgage in favor of Saxon, but that he could proceed to enforce it only by the hypothecary action; and he perpetuated the injunction, "reserving to defendant his right to proceed by the hypothecary action." Saxon appealed from this judgment; and Foreman, appellee, in answer to the appeal, prays that the judgment be so amended as to strike out that part of it reserving to appellant the right to proceed by the hypothecary action.

Appellant maintains that the transfer by Mrs. Mallon to Foreman is absolutely null and void, because it was made without the authorization of her husband; and that it was fraudulent and simulated.

The record contains no evidence of fraud or simulation. The price was \$3000, for which Foreman gave to Mrs. Mallon his note, bearing eight per cent interest from date; but this does not establish either fraud or simulation.

The Revised Civil Code, article 122, declares that "the wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing."

The prohibition to acquire is as absolute as the prohibition to alienate; and if, by reason of the failure of the husband to concur in the act, or to give his consent to it in writing, the transfer by Mrs. Mallon to Foreman was void, it inevitably follows that the agreement between Mrs. Mallon and Mrs. Pecot was void for the same reason.

In reality, no title to the property in question ever vested in Mrs. Mallon. The agreement required her to dismiss certain suits, and to abandon certain claims, in consideration of which Mrs. Pecot promised to transfer the property to her. The performance of this agreement by Mrs. Mallon, if she had the capacity to make the agreement, and to comply with the terms, would not have vested the title in her: it would merely have authorized her to sue for specific performance by Mrs. Pecot, or for damages for non-performance. The recording of the decree against Mrs. Mallon did not create a judicial mortgage on the property in question, because Mrs. Mallon did not own it: and if she had been authorized, or was legally competent to make the agreement with Mrs. Pecot, the recording of the decree would have been no obstacle to the transfer by her to Foreman.

One of two consequences results: Either Mrs. Mallon acquired no right under the agreement with Mrs. Pecot, because of her incapacity; or all the rights flowing to her from that agreement had passed to and vested in Foreman before the execution enjoined was issued. In either case Mrs. Mallon had no property or right under that agreement subject to seizure under that execution.

The title and ownership of the property were in Mrs. Pecot. She was satisfied to part with the one third for the benefits and advantages promised by Mrs. Mallon; and she was content, after having received that consideration, to make the conveyance to Foreman, the transferee of Mrs. Mallon, which she had promised to make to Mrs. Mallon. We know of no principle which would authorize any creditor of Mrs. Mallon to treat this conveyance as a nullity, or to subject the property, simply because of Mrs. Mallon's want of capacity, since she was as competent to alienate as she was to acquire.

The judge of the district court erred in reserving the right of appellant to proceed against this property by the hypothecary action. He never had that right, because the agreement between Mrs. Mallon and Mrs. Pecot did not create any such right in Mrs. Mallon as could be affected by judicial mortgage.

The judgment appealed from in so far as it reserves to appellant the right to proceed against the property in question by the hypothecary action is annulled, avoided, and reversed; and, in all other respects, it is affirmed with costs.

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No. 996.

ELISÉE THIBODEAUX VS. ADOLPHE COMEAU AND WIFE.

A defendant who excepts to the capacity of the plaintiff to stand in judgment does not waive the benefit of the exception by failing to require the court to rule on it before passing to the merits.

The dative testamentary executor alone can not maintain an action to revoke a donation *inter vivos* made by the deceased, on the ground that the donees have not fulfilled the conditions of the donation. The heirs of the deceased are necessary parties to such an action.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin. *Fontelieu, J.*

*C. H. Mouton* for plaintiff and appellant.

*E. E. Mouton, Felix Voorhies, and J. E. Mouton* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. On the 5th. of June 1869 Elisée Thibodeaux donated to Adolphe Comeau and wife, by notarial act, two small tracts of land, and the improvements upon them, appraised in the Act at twenty-three hundred and twenty dollars, and an inconsiderable quantity of movables, valued at two hundred and sixty-five dollars. He had no other property.

At the conclusion of the Act, the "donees bind and obligate themselves to keep in their own house, respect and treat the donor during his lifetime, with the affection and care due a father by good children."

The donor was aged and without wife or legitimate children. Some of his brothers and sisters, and the descendants of other deceased brothers and sisters, were then, and are now living.

In October 1871 he brought this suit to annul and revoke this donation, alleging that Comeau "had been guilty towards him of cruel treatment, and grievous injuries of every description," and that both donees had "the ill-disguised intention to retain the property donated to them, and to disregard the principal condition of the donation, inasmuch as they have acted, and continue to act towards him in such a way as to render their living together insupportable."

Pending this action, Thibodeaux died, leaving a will which is not in the record, and we can not therefore know whether the testator disposed, or pretended to dispose, of the real estate previously donated, nor whether he gave to his executor seizin of his property. That executor did not qualify, and upon the appointment of a dative executor, this suit was revived in his name.

Thereupon the defendants excepted, that this action could not be prosecuted by an executor—that the action is personal to the donor, or to his heirs, who alone can stand in judgment therein after his death.

The defendants did not require a decision upon their exception, but proceeded to trial on the merits. The case went off however on the exception, which was finally sustained by the court. The plaintiff, executor, now insists that the exception must be considered as waived by the defendants' failure to require the court to rule upon it before passing to the merits. The authorities cited do not sustain that position, nor do we think reason justifies it. The exception is not to the capacity of the executor—not that he is not executor—but that, being executor, he has not authority to prosecute this suit. It would certainly have been more regular, and would have saved time which was uselessly wasted in a trial upon the merits, had the court have rendered on the threshold of the trial the judgment which finally became the subject of this appeal. But the defendants are nevertheless entitled to the benefit of the exception.

In *Hart v. Boni*, 6 La. 98, the question was, whether the executors of a will can maintain an action to annul a donation *inter vivos*, made by the testator, and the court say, where seizin is given to the executors by the will, they are authorized to bring an action to recover the possession of any property which may have belonged to the testator at his death. If the claim set up be one, which involves the rights of the heirs or legatees, they should, if present, be made parties to the suit, and if absent, their representatives should be brought in. It is also there said, that in countries having laws similar to ours, it has been held, that although executors can not alone maintain an action in relation

to the rights of heirs, they may do so in conjunction with those who are interested in that capacity.

In a later case, *Brittain v. Richardson*, 3 Rob. 78, it was said, when donations *mortis causa* or *inter vivos* are clothed with all the forms required by law to give them validity, none but forced heirs can sue for their reduction, if they exceed the disposable portion; but it is otherwise, when they are null for want of such formalities, the legitimate heirs of the deceased, or other representatives of the estate having, as well as the forced heirs, an action to have them annulled.

In the present case there is no question of the nullity of the donation for want of any formality, nor of any excess in the donation of the disposable portion, since there are no forced heirs. Neither is the executor's right to maintain this action fortified by his seizin of the property, since in the present instance the executor is not testamentary, but dative.

Marcadé, treating specially of the action of revocation for cause of ingratitude, says, the second paragraph of art. 957 of the Napoleon Code declares expressly, que la révocation ne peut être demandée ni contre les héritiers du donataire, ni par les héritiers du donateurs; l'action est toute personnelle, activement et passivement, et doit être intentée par le donateur lui-même contre la personne même du donataire. Mais la loi apporte une exception à ce principe quant aux héritiers du donateur; elle leur permet de continuer l'action quand elle a été intentée par leur auteur. *Exp. du Code Nap.* vol. 3, p. 584.

There is no intimation that the action can be maintained by any one but the heir. It is true the cause of revocation in this case is not ingratitude, but the alleged non-fulfillment of the sole condition upon which the donation was made—the condition being, that the donees should keep the donor in their own house, and treat him through life with the affection of children, and the alleged violation being, that their conduct towards him rendered living with them insupportable.

The present action in revocation is assimilated to that for the enforcement of the resolutory condition in a sale. The property donated is almost exclusively real estate, or that kind of property in which the heir is peculiarly interested, and of which he is the inheritor. No creditor is interested. There are none. *Non constat* but the heirs of an irascible old man would recognize in the kindly attentions of the donees, of which the record bears witness, the evidence of a desire to fulfill the condition, imposed upon or assumed by them, and their determination to do it as far as the impetuosity of his blind anger will permit them.

We think the heirs are necessary parties to an action of revocation of a donation of this kind, and for the causes set up here.

The judge of the first instance so held, but he went further, and gave an absolute judgment, quieting the defendants forever in their pos-

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 Thibodeaux vs. Comeau and Wife.
 

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session and title. This is error. The exception was properly sustained, but the defendants are not entitled to a final judgment, nor should the suit be dismissed, but the parties should be remitted to the condition they were in when the donor died. The suit should stand as it then was on the docket, until the heirs become parties either alone, or with the executor. Therefore

It is ordered, and decreed that the judgment of the lower court, in so far as it sustains the exception of want of proper parties, is affirmed, and as to the other part thereof is reserved, and the case is remanded for farther proceedings, the appellees to pay the costs of appeal.

Mr. Justice DEBLANC recuses himself in this cause, having been of counsel.

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 No. 1021.

STATE EX REL. W. F. SCHWING, DISTRICT ATTORNEY PRO TEM., vs. THEODORE FONTELIEU ET AL.

In a rule taken on a judge to show cause why he should not be recused in a certain suit, personal citation of the defendant, even when served on him in a parish other than the parish of his domicile, is sufficient.

Parties may be sued before whatever tribunal the legislature shall designate.

The act 129 of the Legislature of 1877, touching the recusation of judges, is not in conflict with the constitution of the State.

To a rule taken under act 129 of 1877 on the district judge, and the parish judge of the parish in which a certain suit has been brought, to show cause why both of them should not be recused in the suit, the parish judge is a necessary party to the rule, and the trial of the rule should be continued until he has been cited.

**A**PPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Moulton, J.*

*W. F. Schwing, District Attorney pro tem., R. S. Perry, J. A. Breaux, and D. Caffery* for plaintiffs and appellees.

*E. Simon* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. This suit is brought before the Sixteenth District Court for the parish of Lafayette. Relators allege that they have brought suit in the Third Judicial District Court for the parish of Iberia, against Theodore Fontelieu, of said parish, to test his eligibility to the office of judge of said district, held by him. That the said Fontelieu, being defendant in said cause, and personally interested therein, is recused, and that T. J. Allison, the parish judge of said parish, is related to said Fontelieu within the fourth degree, and is incompetent to try, and by law recused in said cause. They, therefore, bring this proceeding before the nearest district judge, and pray for a rule on said Fontelieu

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State ex rel. Schwing vs. Fontelieu.

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and Allison to show cause why they should not be recused and said suit transferred to and tried in the district court in and for Lafayette parish, agreeably to the provisions of act number 129 of 1877. The rule was granted by the judge of Sixteenth District, and the defendants ordered to show cause as prayed for, within three days from service thereof. Judge Fontelieu being at the time in the parish of St. Mary, the rule was served on him personally by the sheriff of that parish.

On the appointed day the defendant, Fontelieu, appeared and filed exceptions as follows:

1. To the mode and place of service of the rule.
2. To the jurisdiction of the district court of Lafayette, on the ground that he was a citizen of Iberia.
3. That act number 129, under which relators proceed, is in conflict with acts 90 and 114 of the Constitution.

The case was twice continued for want of service on Allison. On the seventh May the relators, alleging that Allison was a necessary party and had not yet been served, asked a further postponement to cite him. This was refused and the case taken up, and evidence *pro* and *con* introduced. The judge, thereupon, held that Allison was a necessary party, that the case could not be tried without him, that relators had shown no diligence in causing him to be served, and dismissed the rule as in case of nonsuit. Relators have appealed.

We shall consider, *seriatim*, the various points raised, especially those relating to the constitutionality of act 129, since if that act is unconstitutional the proceeding must be dismissed for that if for no other reason.

1. We do not think that the service of a rule to show cause in a summary proceeding like this must necessarily be made in the parish of the defendant's domicile, except when personal service can not be had. It is sufficient in this class of cases that the service be made in person on the defendant. It would be very inconvenient to hold that rules to show cause must be served in the parish of the domicile, for that would interfere too much with the progress of these summary proceedings. Thus a litigant in the courts of St. Landry, residing in Orleans, though personally present in St. Landry pending the progress of his suit, could not be served personally with any of the many rules that are granted daily in the courts. According to respondent's views, a rule to show cause why testimony should not be read, would, in the case supposed, have to be sent and served at the domicile in New Orleans, if the party had no attorney present, although the party himself were present in the courthouse at Opelousas. We think the service in person on the defendant in St. Mary sufficient. He is deprived of no conceivable right by it, and can not be prejudiced by it.

2. The second objection is without force if the act 129 is the law, since the will of the Legislature is unrestricted in determining where parties may be sued.

3. Is act 129 in contravention of articles 90 and 114 of the Constitution? Article 90 is as follows: "In any case when the judge may be recused, and when he is not personally interested in the matters in contest, he shall select a lawyer \* \* \* to try such case. And when the judge is personally interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case."

The argument is that the case before us is provided for by this article, and that, therefore, the act 129, providing a different mode of trial, is unconstitutional. It is contended that the district judge in this case being *personally* interested, must call upon the parish judge, who, thereupon, becomes district judge, *pro hac vice*, and who, not being *personally* interested, but only recusable on other grounds, has the power of selecting a lawyer to try the case. We can not accept this view. It is the judge before whose court the case is brought that has this power of selection. The article does not give the substituted judge *ad hoc* any such power. When the parish judge is substituted, there is no more reason to say he has this power of selection, if recused, than for saying that the lawyer has, where he is substituted. Neither of them is *the judge* of that court. They are both mere judges *ad hoc*.

Nor do we think the act is void under article 114, which provides that "every law shall express its object or objects in its title." The purpose of this act is well known. It was to protect the Legislature by making the title of the act declarative of the general purposes of the act, so that on hearing the title read (which is the usual mode of reading acts in legislative assemblies) the members would know the subject matter in a general way, of the bill. The provisions of the act must be germane to the matter specified in the title. We think such is the case with act 129. We, therefore, conclude that said act is constitutional.

We have seen that under said act the parish judge was and is a necessary party to this proceeding. Until he was before the court the case could not be tried. We know no rule of law that justified the district judge in dismissing the suit because he had not been cited. Of necessity the case should have been continued. So far as relates to the convenience of the party who had been cited, the judge should have ordered notice to be given him after service had been effected on the other party of any future fixing of the case. We are not prepared under the facts disclosed in this record to condemn the relators for laches. They did their duty in ordering the process to issue. There is evidence in this record of undue and partisan interest exhibited by some of the parochial officers of Iberia which deserves censure. The judge



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State ex rel. Schwing vs. Fontelleu.

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before whom this case is pending is by virtue thereof seized of jurisdiction, *quoad* this case, over the officers of Iberia, and it is his duty to force them to do their duty, and in default to punish for the contempt, and even by suspension. District Attorney vs. Richmond, 29 An.

It is therefore ordered and decreed that the judgment appealed from be annulled and set aside, and that this case be remanded to be proceeded with according to law and the views herein expressed..

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No. 1000.

URANIE BÉRARD VS. VINCENT BOAGNI.

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A depositary may show by parol evidence that the money deposited with him, and for which he had given his written receipt, was composed of certain bank bills. A depositary is not liable for any depreciation in the value of bank bills deposited with him, unless it appears that the depreciation has proceeded from his fault, or has occurred after he was in default to restore the deposit.

Before a party can be held in damages for failing to do what he has contracted to do, he must be put in default by a written demand, or a verbal demand in the presence of two witnesses.

The obligations of a depositary are prescribed in ten years from the time he is in default for not restoring the deposit.

**A** PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

*Kenneth Baillio* for plaintiff and appellant.

*Garland & Dupré* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff sues to recover of defendant \$800 and interest from April 1, 1861, being the amount contributed by certain persons for her benefit and received by defendant "on deposit and in trust for her." In the receipt executed by defendant on 1st March, 1861, he acknowledges to have received the amount "for Madame Uranie Bérard." It is also stated therein that the sum is contributed for the purpose of aiding to build or to buy for her a home, or to rent one for her. It is further recited that her receipt shall suffice for the discharge of Boagni, and that his responsibility for the fund shall not extend beyond that of Bellocq, Noblom & Co., of New Orleans, or other house with whom he does business, upon his depositing the same with said house.

The evidence shows, and it is not denied, that the defendant received this \$800 in eight \$100 bills of the Bank of Louisiana; that he sent these bills to and deposited them with a member of the firm of Bellocq, Noblom & Co., of New Orleans; that at the close of the war these identical bank bills (of which the letter and numbers were preserved by defendant) were returned to him by said firm, and that just prior to the insti-

tution of this suit the plaintiff made a written tender of them to the plaintiff, who refused to receive them.

The discussion in this case has taken a wide range, and it has been argued with zeal and ability on both sides ; but under the views we have taken it will not be necessary to enter upon so wide a field. The only questions material for us to consider are :

First—Whether the defendant could show by parol that the deposit with him was not money, but bank-bills.

Second—If so, is he, as depositary, liable for their depreciation in value while in his possession.

First—On the first question, we think that it was competent for him to show the fact that the eight hundred dollars were represented by bank-bills. It has been long established that receipts for money are open to explanation by parol, and that the rules relative to the admissibility of parol to vary or contradict written contracts do not apply. Besides, it is hardly a contradiction to show that the thing received was ‘eight hundred dollars’ in bank-notes. See 5 A. 235 ; *Ib.* 408 ; 14 A. 274 ; 7 N. S. 534 ; 8 R. 246.

Second—The doctrine is that the depositary is liable for deterioration, and therefore for depreciation, only when it has proceeded from his fault, or has occurred after he was in default to restore the deposit.

There is no pretense that the depreciation of the notes of the Bank of Louisiana proceeded from or is attributable to any fault of defendant. It only remains to inquire, therefore, whether this depreciation took place after defendant was in default to restore the deposit. If he was in default, he is responsible for such loss as resulted thereafter. The plaintiff contends that he was put in default by the terms of his receipt: that the fact that he did not build or buy or rent her a home was a default ; that his neglect to restore the fund to her to be used for the purposes intended constitutes default on his part. We can not concur in these views for two reasons :

First—We do not see that the defendant assumed or undertook to build, buy, or rent the house. He simply received and agreed to hold the funds on deposit, contributed for that purpose.

Second—But even had he assumed such obligation, it would have been an obligation to do, and in order to make him liable in damages a formal putting in default, by demand in writing, or in presence of two witnesses, was necessary. C. C. 1911 and 1933. It is not pretended that such demand was ever made. Besides, the present suit is not one in damages for not doing the things for which the contributions were made, but is brought to recover the fund deposited. The things deposited were bank-notes. His obligation as depositary was to keep them, and restore or disburse them when called upon. It can not be asserted that

he failed to do these things. He certainly kept them, the identical bills, as he promised, and there is no proof that any demand was ever formally made for their delivery. In fact, we think no demand, formal or informal, was ever made for these bills.

But, if plaintiff's views be correct, that defendant was in default from April 1, 1861, when it is contended he failed and neglected to do the things with which it is alleged he was charged, then the plea of ten years prescription would apply, for it is manifest that prescription will run in favor of a depository from the time he is in default to deliver the deposit; so that the plaintiff is placed in this dilemma, that if defendant was in default, as alleged, then prescription has run in his favor. If he was not in default, then he is only bound to restore the deposit, such as it is. This the defendant formally offered to do, before this suit was brought. This tender on his part should relieve him from costs.

The judge *a quo* gave plaintiff judgment for the eight bank-notes deposited, and condemned defendant to pay the costs. We think this judgment correct, except in so far as it condemns defendant for costs.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to condemn plaintiff to pay the costs, and that as thus amended, and in other respects, the said judgment is affirmed.

#### No. 1032.

#### WIDOW BRIANT VS. DÉSIRÉE HÉBERT ET AL.

When the signatures of the two sureties of an appeal bond appear at the bottom of the bond, and the name of *one* of them appears in the body of the bond, the bond is good and sufficient.

When the sheriff makes a return of a writ of *fi. fa.*, under which he has seized certain property after the return day of the writ, and retains a copy of the writ, written by himself, it is not necessary that he should append to the copy his certificate of its correctness, in order to enable him to make a valid sale of the seized property. Under such circumstances, the return of the writ after its return day, will not affect the validity of the sale.

**A** PPEAL from the Third Judicial District Court, parish of St. Martin.  
*Fontelieu, J.*

*E. Simon & L. J. Gary* for plaintiff and appellant.

*Mouton & De Baillou* for defendant and appellee.

#### ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The motion to dismiss is based on the ground that the names of the sureties to the appeal are not inserted in the body

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Briant vs. Hebert.

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of the bond. This ground would be good, if the fact were as stated. There are two sureties, whose signatures are at the bottom of the bond, which is for one hundred dollars, and the name of one of them is inserted in the body of the bond, and that makes it good. The motion is denied.

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ON THE MERITS.

The defendant had issued execution on a judgment obtained by him against the plaintiff, and she has enjoined the sale under it. The sole ground of injunction is, that the writ of *fiery facias* had expired, and had been returned by the sheriff to the clerk's office, and was there filed subsequent to the expiration of the writ, which fact, the plaintiff alleges, divests the sheriff of all rights of possession of the property, and of all authority in the premises.

The writ issued May 29, 1877. The seizure was made, and notice was served in July, and the property was then advertised for sale—the sale to take place on first Saturday in September. The seventy days which the writ had to run expired on August 8th. On the 11th. of that month the original writ was filed in the clerk's office, with this return written upon it:—"Received the within writ on the 29th. day of May 1877, and duly proceeded to execute the same by levying upon the property of defendant, and the time specified by law for the return of the writ having expired, it is hereby returned unsatisfied after having kept a correct copy of the same."

The position assumed by the plaintiff is, that since the original writ was returned after the expiration of the seventy days, the sheriff was totally divested of authority to proceed further. The fact that the officer had retained a copy does not appear to have been thought material by the plaintiff when she applied for an injunction. Her petition does not allege any informality or vice in the return as ground for the writ. The fact that the sheriff had not returned the writ on or before the expiration of seventy days, it was supposed, invalidated all his subsequent proceedings. The fact that a copy had been retained was known. It was stated by the sheriff on the original, but it was not considered of any consequence, inasmuch as the return was made after the seventy days had expired.

Afterwards, and on the trial, another ground of invalidity was set up in argument, as it is here, viz that the copy of the writ, retained by the sheriff, was not certified by himself.

We do not think either ground tenable. Formerly the sheriff could proceed with the original writ, and was not bound to return it unless required by the plaintiff. *Rowley v. Kemp*, 2 Annual, 360. Now, when a seizure has been made under a writ of *fiery facias*, and the property

can not be sold before the return day, the officer must nevertheless return the writ, but at the time of making the return, he must make and retain a copy of it, duly certified by himself, and proceed to the sale under the certified copy. Code of Practice, art. 642.

The sheriff in making the return in this case kept a correct copy of the writ, made by himself. The fact that he did not append to this copy his own certificate of its correctness does not invalidate it. The essential matter is that he shall make a correct copy, and retain it, and proceed under it. When the copy is made by himself, his own certificate does not assure its correctness more than the fact that he made it. It is not pretended that his copy was incorrect, and the provision that he shall certify to its correctness is not sacramental, when he makes it himself. The provision is merely directory, and he substantially complies with it when he makes it with his own hand.

Nor is it essential that his return shall be made before, or at the expiration of the time limited for the writ to run. He had done under the original all that was to be done except making the public cry of the property, and the adjudication. If before this exposure for sale, and adjudication, the return is made, and a correct copy is retained, he has in his hands the authority to act, and his sale is legal.

The object of compelling the sheriff to make return of the writ of *feri facias* within a specified time, was to prevent the future recurrence of a grave abuse of which the sheriffs had sometimes been guilty, and to put it in the power of the plaintiff in execution to control his official conduct thereon. A sheriff might, and sometimes did, fail to proceed under the writ, and as he had it in his own custody, a plaintiff would be ignorant of what his action had been. The statute therefore provided that he should return the writ within a given time, by which means the party interested in its enforcement learned what official action had been taken under it, and if he did not return it, he became liable to the party entitled to the benefit of it for the full amount specified therein. Rev. Stats. sec. 34<sup>th</sup>8.

The purpose of the requirement was then to enable the plaintiff to exercise the surer and speedier control over his process. The defendant was not injured more by having his property sold under a copy than under an original, and the material matter for officer and parties is that the copy shall be correct, so that the particular property seized or directed to be sold shall be the same as that mentioned in the writ, if any special property shall be thus mentioned, and the sum to be realized by the sale shall be neither greater nor less than that specified in the original.

The single ground upon which the injunction was sued out, and its want of force, shews that the process was invoked for delay. The

Briant vs. Hebert.

defendant prays for twenty per centum damages, and ten per centum additional, and one hundred and fifty dollars as attorney's fee. We are not disposed to inflict the heavy damages prayed. The fee of the attorneys is estimated by a witness at one hundred dollars. The judge below dissolved the injunction with ten per centum damages. That is enough.

Judgment affirmed.

Mr. Justice DeBLANC is recused in this case.

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No. 1027.

DUNCAN GREIG, TUTOR, vs. H. EASTIN, SHERIFF, ET AL.

Minors under the tutorship of their father do not come within the terms of the homestead act.

Property held in indivision can not be the object of a homestead right.

Minors will be held in damages only for the actual expenses of a defendant in injunction, caused by a wrongful injunction sued out by their tutor.

**A** PPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Mouton, J.*

*E. E. Mouton* for plaintiff and appellant.

*M. E. Girard* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Plaintiff, as tutor of his four minor children, enjoins a writ for the seizure and sale of their plantation issued to pay a mortgage debt held by G. A. Breaux. The grounds of injunction are, first, that part of the property seized is exempt from sale under the homestead act; second, that the sheriff is proceeding to sell said lands without subdivision into lots of ten to fifty acres.

First—The property seized belongs exclusively to four minor children of Greig, and they hold it in indivision.

They are under the tutorship of their father, and do not come within the terms of the homestead act as persons having others dependent upon them. Property held in indivision can not be the object of a homestead right. See 23 A. 153; 23 A. 733, 832; and *Cole vs. LaChambre*, not yet reported.

Second—By act 32 of regular session of 1877, approved March 8th, the law (sec. 3451 of Revised Statutes) providing the mode of dividing land into lots was repealed. This act repeals the special laws referred to in art. 654 C. P. We have held that "art. 132 of the constitution is of that class of provisions which remain necessarily inoperative until the mode of giving them effect is provided by statute." *Bohn vs. Bossier*, 29 A. 146; 24 A. 214. The sale in this case was advertised to take place

Greig vs. Eastin.

on Saturday, 5th May, 1877, nearly two months after the repeal of the law providing the manner of division under art. 132 of the constitution.

There are other satisfactory reasons urged why the plaintiffs are not entitled to the homestead, or to the division into lots, but it is unnecessary to state them.

The judge *a quo* dissolved the injunction but refused to give damages. The defendant and appellee has filed an answer to plaintiffs' appeal praying for damages. The plaintiffs in this cause are minors. Their tutor has abused the equitable writ of injunction; but we are not disposed to visit his sins upon them, beyond what will be a most moderate allowance to the defendant for his expenses and costs. We will allow damages to the amount of five per cent on the amount of principal and interest of the debt enjoined.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, and that the defendant, G. A. Breaux, do have and recover of the plaintiffs and surety on the injunction bond *in solido*, as damages, five per cent on the amount of judgment enjoined, and as thus amended said judgment is affirmed; appellant to pay costs of both courts.

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No. 993.

MARY A. QUERIN, ADMINISTRATRIX, vs. E. CARLIN.

Where a natural tutor, without authority from the court, borrows money for his own account and in his individual name, and expends the money on improvements of a plantation owned in common by him and his minor children, but which improvements were for the use and benefit of a planting partnership in which the minors had no interest, the minors can not be made liable for the borrowed money to the lender of the same.

And a subsequent mortgage of the minors' property to secure such a debt will not be binding, although authorized by the proceedings of a family meeting homologated by an order of court.

**A** PPEAL from the Third Judicial District Court, parish of St. Mary. *Fontelieu, J.*

*Fred. Gates* for plaintiff and appellee.

*D. Caffery* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. E. Carlin owned in common with his eight minor children a tract of land in St. Mary parish; said children owning one half, in right of their deceased mother.

In 1870 Carlin entered into a contract of partnership with Felix Birg, to cultivate this land; Carlin agreeing to furnish the land and supervise the cultivation; Birg to advance the money for that purpose, without interest, etc. It was further agreed that "all buildings, including the

sugar-house and its appurtenances, and fences are to be built at the expense" of Carlin.

It seems that Carlin, from time to time, obtained money from Birg which he used in whole or part in building the sugar-house, and other improvements on the land, until, in May, 1871, the loans by Birg to Carlin amounted to several thousand dollars. Birg became uneasy about the debt, and insisted that Carlin should give him a mortgage to secure it, not only on his own half of the property, but upon that of his minor children, of whom Carlin was natural tutor.

Carlin, thereupon, presented a petition to the probate court, setting out that he owned this property in common with his children; that he had borrowed money from Birg, and expended the same in improving the place, thereby benefitting said minors, and had given Birg his notes therefor. He prayed the convocation of a family meeting to authorize and advise his securing said debt to Birg by a mortgage of the whole property, including that of the minors.

The family meeting was convened, and so advised. Their deliberations were homologated, and Carlin executed the mortgage accordingly, to secure his notes for \$3500 given to Birg.

This suit is brought by Birg's administratrix against Carlin to enforce that mortgage. The under tutor of some of the minors, and others of the said children arrived at majority, intervene and oppose the plaintiff, in so far as she seeks to enforce her claim on their half of the property, alleging that they owed Birg nothing, and that the mortgage was granted illegally and without consideration as to them; that the debt was that of their father and not for their benefit, etc. There was judgment for plaintiff, and intervenors and defendant appeal.

There is no doubt that Birg loaned Carlin money, and that considerable sums of this money were expended by Carlin in putting up a sugar-house and other improvements upon the common property. But it is not pretended that in borrowing money from Birg he acted as tutor, or in the name or behalf of his minor children, or that he had any authority whatever from the court so to do. These loans were effected in his own name, from his partner, to carry out his own obligation to put certain improvements upon the property put by him into the partnership. There is no pretense that Birg loaned the money to him as tutor, or on the faith or credit of the minors. This planting partnership was an affair in which the minors had no interest or concern, and were in no way to be profited. It was a speculation of Carlin and Birg's, and the sugar-house was put up that they might profit by it. It was only after disaster stared them in the face that they bethought themselves of saddling half this debt on the minors. Carlin owed Birg. The minors owed Birg nothing. They may or may not owe their tutor;



that will depend upon the extent to which their property has been enhanced in value, and upon the state of accounts between them and their tutor. There is evidence in this record tending to show that their tutor owed them largely—far more than they could ever owe him for these improvements of their property. It being clear, therefore, that the minors owed Birg nothing, and rendered more than probable that their father owed them far more than would re-imburse him for useful improvements, there was no foundation or basis for a mortgage upon their property. They could not be thus made security for his debt to Birg. The law does not allow such a transaction between a tutor and his wards. Even if the ward owes the tutor the latter can not enforce the debt until the tutorship expires. What he can not do himself he can not do by interposing his creditors, or by subrogating them to his rights. The very best phase that can be put upon the facts of this case for plaintiff, would be that the minors owed Carlin, and that he owed plaintiff. But, as we have seen, a tutor's rights are not executory against the minors pending the tutorship, and can only be ascertained and become executory on final settlement of the tutorship. Besides, it does not follow that because a tutor has expended a given amount of money in constructing buildings upon his wards' property that, therefore, he is to be credited with that amount. The expenditure must be useful and beneficial. It is easy to see that a minor's estate might be absorbed and swallowed up by injudicious and unauthorized improvements beyond his means and ability to pay. Such improvements, while costing thousands, might in reality bankrupt instead of enhancing his fortunes. Once admit the right of a tutor to "*improve*" *ad libitum*, and there is an end of protection for the ward. Upon the face of the tutor's application in this case, the family meeting and the court should have refused the authority to mortgage the minors' property. Even when the forms of law have been complied with, courts will look behind them to protect minors from loss in matters of contract. C. C. 1866 and 1867. Those who deal with minors must, at their peril, be prepared to vindicate the *bona fides* and justice of their demands.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it rejects the demands of intervenors and subjects their half of the property in question to plaintiff's debt and mortgage, be annulled, avoided, and reversed; and it is now ordered that the opposition of intervenors be sustained, and that they have judgment against plaintiff, and that their half of said property be decreed not subject to the debt and mortgage asserted by plaintiff.

It is further ordered that intervenors recover of plaintiff the costs of their intervention in both courts. That in other respects said judgment is affirmed.

State vs. Baker.

No. 1011.

THE STATE VS. SARRAZIN BAKER.

The State has a right to ask the jurors in a criminal case, whether they have conscientious scruples against finding a verdict which would entail capital punishment.

A witness in a criminal case may be recalled, even after he has been examined and cross-examined.

On the trial of an accused for murder no specific act of the deceased, unconnected with the killing, is admissible in evidence.

The crime of manslaughter is prescriptible in one year from its commission.

The entering of a *nolle prosequi* by the State's Attorney, on a motion to quash an indictment amounts to a voluntary abandonment of the prosecution, in which case the indictment will not have the effect of interrupting prescription.

**A** PPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Moulton, J.*

*Joseph A. Chargois*, District Attorney, for the State.

*M. E. Girard* for defendant.

#### ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The State moves to dismiss this appeal for diminution of the record. The missing papers have been brought up in a supplemental transcript. The defendant would have the right to a *certiorari* to complete the record, but he has saved the Court and himself time in supplying what is missing, and there is no pretence that these are not the papers which would come up in answer to a *certiorari*.

The motion to dismiss is denied.

#### ON THE MERITS.

Upon an indictment for murder the defendant was convicted of manslaughter, and sentenced. His appeal is based upon three bills of exception, and the plea of prescription, the latter being filed in this court.

1. Three jurors, answering upon their *voir dire*, were asked if they had conscientious scruples against finding a verdict which would entail capital punishment. The prisoner objected to the question, but the Court allowed it, and the Court was right. The State has as much a right to a fair and unbiassed trial as has the prisoner. The State is vitally interested not only that offenders against her laws shall be punished in some way, but that they shall be punished in the way she has prescribed, and she has the right to know of a juror whether he has already determined not to punish in one of the modes she has provided, under the pretext of a tenderness of conscience which yearns towards the criminal

and not to society. The question was properly permitted to be asked. State v. Melvin, XI Annual, 535. State v. Nolan, 13 Annual, 276.

2. Before the State had closed its evidence, a witness was recalled who had already been examined and cross-examined. The prisoner objected to any further examination of this witness, but the court allowed it.

This practice has obtained too long to be disallowed now. State v. Duncan, 8 Rob. 562. State v. Colbert, 29 Annual, 715.

3. The prisoner offered his mother as a witness to prove that the deceased had attempted on the day before the homicide to have carnal knowledge of her against her will. The State objected on the ground that evidence of character of the deceased is inadmissible.

The objection to the testimony is not put on the proper ground. The evidence was not of the character of the deceased, but of a specific act done by him, and its object was doubtless to shew that it was an incentive or inducement to the commission of the homicide, but there is nothing to connect it with that act. In the oft repeated language of the books, it did not form part of the *res gestæ*, and was properly excluded.

Last, as to the plea of prescription.

The offence of manslaughter is prescriptible in one year. The homicide was committed on June 7, 1871, and a bill was found in October of the same year. A motion to quash was made by the prisoner, and a similar motion having been sustained in other cases, a *nolle pros.* was entered on April 22, 1874. On the same day the Grand Jury found another bill, and on another motion to quash being made July 26, 1875, another *nol. pros.* was entered in October following, and immediately thereafter a third bill was found, and under it the conviction was obtained.

The State contends that there was not a voluntary abandonment of the prosecution under the first bill. The court had sustained a similar motion to quash in other indictments against other prisoners, and the District attorney therefore entered a *nol. pros.* in this without provoking a decision upon the motion in this case. He should have had the court to rule on the motion of the prisoner in this case.

But when the motion to quash the second indictment was made, the State again entered a *nol. pros.*, and this time solely because the prosecuting officer was satisfied it would be sustained. Here was a voluntary abandonment of the prosecution, and the plea of prescription, interposed by the prisoner, is effectual for his protection.

We are referred to the State v. Cason, 28 Annual, 40, where the doctrine is broadly asserted that, if the prosecuting officer finds that the indictment is defective, he can enter a *nol. pros.*, and proceed under a new indictment, although more than a year has elapsed from the com-

mission of the crime to the finding of the new bill. We are constrained to overrule that decision, since it does not accord with the established rules in criminal procedure. The opposite doctrine was asserted in *State v. Thomas*, 29 Annual, 301, and we reaffirm it.

We are asked by the State to remand the case, in the event we shall hold the plea of prescription to be good, and we shall take that course to enable the State to shew acts, or proceedings, or other matter, which may have interrupted prescription, or avoided its effect. Therefore

It is ordered and adjudged that the verdict of the jury is set aside, the judgment of the lower court thereon is avoided and reversed, and the cause is remanded to be proceeded in, and for a new trial of the prisoner, who is ordered to be retained in custody to await the same.

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No. 981.

HONORÉ MÊCHE ET AL VS. D. LALAMIE, ADMINISTRATOR.

Before the creditors, or the administrator of a deceased vendor who has sold certain real estate by an act under private signature, can annul the act as simulated, it must appear that it injured the creditors, and that their debts existed before the execution of the act.

The oath of an intervenor, going to show the nature and amount of his claim, is not admissible in evidence when filed for the first time in this court.

**A** PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

*A. Bailey* for plaintiffs and appellees.

*Jas. M. Moore* for defendant and appellant.

*Jno. N. Ogden* and *Kenneth Baillio* for intervenor.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs in this suit, the children and heirs of Hypoite Mêche, deceased, late of the parish of St. Landry, alleging themselves, as heirs aforesaid, to be owners of certain movable property in the possession of defendant, as the administrator of the estate of one Thomas Moore, deceased, late of said parish, seek to recover the same from the defendant. Their demand to be declared owners, and to be put in possession thereof, is accompanied by a writ of sequestration.

The answer of defendant to plaintiffs' petition is a general denial, an averment that the property had always been in the possession of the deceased, Moore, and that the pretended act declared on was fraudulent and simulated. Mrs. Alfred Moore intervened, alleging that she was a privileged creditor of the estate of Thomas Moore, for a large amount, and an ordinary creditor for a considerable sum; but she specifies no

amounts whatever. She joins the defendant, and prays that plaintiffs' demands be rejected.

Upon these issues the case was tried. The district judge, after an able and exhaustive review of the facts and law of the case, gave judgment for plaintiffs, and the defendant and intervenor appeal.

The basis of plaintiffs' claim is an act of sale, *sous seing privé*, of date May 1, 1871, whereby Thomas Moore sells to Hypolite Mêche, for \$1550 cash, the property in controversy; consisting of improvements on a certain tract of land, and a lot of cattle, horses, and other stock. This act appears to have been recorded, but the date of its registry is not given. On the trial it was offered and received in evidence without objection. We think that its execution is sufficiently proven by the testimony of Simeon Richard and Honoré Mêche, two of the attesting witnesses. Its date is also shown, inferentially, to have been about that which it bears, by the testimony of Honoré Mêche, who says that about *five* years ago he worked a piece of the Thomas Moore land—that this was *after the sale* to Hypolite Mêche by Moore. It also appears that this property was for several years assessed to Mêche—that his son worked part of it without rent, and rented out part of it to one Willis. It is also shown that Moore on several occasions declined to give in the property for assessment as his, saying it belonged to Mêche, and repeatedly stated that Mêche was its owner. It is also shown that prior to this sale Mêche paid some considerable debts of Moore's, and that on the day of sale he paid him quite an amount in cash.

On the part of the defense it is shown that Moore continued in the possession of the property sold, but, it seems, disclaimed ownership, saying that Mêche let him use it for a livelihood. Mrs. Alfred Moore, the cook and housekeeper of Thomas Moore, and, we are informed, an ignorant colored woman, testifies to various declarations of Moore and one Trask among themselves going to show that the sale was a simulation. In fact, in this case as in all others like it, there is much contradictory swearing; and it would be unsafe for this court, which has no personal knowledge of these witnesses, and did not hear their testimony, to undertake, without grave reasons, to say that the learned judge of the court below erred in weighing their testimony.

In fact, the only circumstance in the case which in our opinion seriously militates against plaintiffs' demand is the continued possession of Moore. But this is a contest between the estate of Moore, who was the vendor, and Mêche, the vendee. The rule is that, as between the vendor and his heirs not forced and the vendee and his heirs, a counter letter is the only evidence admissible of simulation. True, the creditors of the vendor and, therefore, his administrator, may, by alleging and proving injury to themselves, criticise and attack the sale as simulated, and

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 Meche vs. Lalamie.
 

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resort to parol proof of it. But before a creditor of the vendor can annul his acts as simulated it must appear that it injures the creditor, and that his debt existed before the execution of the act complained of.

We have examined with care the evidence in this case, and think that the conclusion of the district judge should be maintained. He properly dismissed the intervenor, who neither alleged nor proved any specific amount of indebtedness. Of course, no evidence can be received in this court. Hence, the oath of the intervenor as to the nature and amount of her claim, filed for the first time in this court, must be disregarded.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be affirmed with costs of both courts,

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 ON REHEARING.

MANNING, C. J. A careful reconsideration of our former decree has not shaken our confidence in its correctness, and therefore

It is ordered and adjudged that our former decree remain undisturbed.

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 No. 997.

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 SUCCESSION OF MARIA BAUMAN. ON OPPOSITION OF HEIRS.

While administrators and executors must sustain the charges set forth in their accounts, the kind and degree of proof vary according to other facts which may be proved, or which appear on the face of the papers. There is a presumption in favor of the correctness of an executor's account whose general management evinces fidelity and integrity.

Heirs who occupy a portion of the succession property are liable to the succession for the rents of such property, during their occupancy.

**A** PPEAL from the Parish Court of Iberia. *Allison, J.*

*Jos. A. Breaux and W. F. Schwing* for opponents and appellants.

*R. S. Perry and W. S. Haase* for executor and appellee.

## ON OPPOSITION OF HEIRS.

The opinion of the court was delivered by

MANNING, C. J. John Fisher was appointed and qualified as executor of Maria Bauman's will. He was also one of her heirs. The property consists of improved lots in the town of New Iberia, which were inventoried at \$7,350. He has filed three accounts, to which two of the heirs presented as many separate oppositions. The grounds of opposition are numerous, and evidently designed to put him to the proof of his whole gestion. Some of them were that the rents, due and

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Succession of Bauman.

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uncollected, were not accounted for—that rents which ought to have been obtained, and were not, should be charged to him—that the sums paid for repairs, etc. are excessive, and were not owing by the property—that he paid his lawyers too much, and ought not to have paid them at all out of the succession funds, but out of his own—that he can not retain the sum due (\$1156.50) for rent by some of the heirs, or remit to them what should be paid on that account, etc.

It is quite impossible, and would be improper, to go through these accounts in this opinion item by item, and state the charge, the proof, and its effect. The vouchers and the oral testimony of the executor are very complete, and in our judgment substantiate the account in its entirety. Besides which, we meet in this case what we had placed before us in another case at this term—two whole transcripts of other cases offered, we are informed, to prove *rem ipsam*. The fact could so easily have been stated under the form of a joint admission that we are not inclined hereafter to permit this mode of burthening the court with unnecessary labour.

It is very easy for persons, who have had nothing to do with the practical management of an estate, to conceive sundry ways in which its revenues might and ought to have been increased, and its expenses diminished. This house did not rent for what might have been obtained for it, or that house was shut up when a tenant might have been had. The sum charged here for repairs is excessive, and that charged there was uselessly expended. But all who are familiar with the management of successions in the last few years, either as executor or lawyer, know the many and serious embarrassments, and hindrances, that have existed to the successful gestion of an estate. The executor of Mrs. Bauman has shewn more than ordinary care, judgment, and diligence, in the collection of the small rents for each lot, and as a whole, his administration, thus far is not fairly liable to attack.

There is some question as to the proof of some of the items—its sufficiency, completeness, etc. An executor must sustain his charges by proof, but the kind and degree of proof varies according to other facts which may be proved, or which appear on the face of the papers. For instance, an executor whose general management is characterized by fidelity and integrity, will have a presumption raised in his favor of the correctness of his account, and many items charged by such a representative of a succession will be admitted and approved upon slenderer proof than would be required of one who had by his conduct exhibited the purpose to administer for his personal benefit, instead of for that of those who are entitled to the succession, and who had united negligence to rapacity in dealing with the property and funds of the succession.

The appellee prays the amendment of the judgment, so as to decree

that the heirs are not responsible for rents. Some of the heirs occupy some of the houses. It would be unjust and unequal to permit these to use portions of the property free of charge, while other heirs are not using any part of the property. And there are probably not two heirs who are using property of same value. The rent of the house used by one may be much larger than the rent of that used by another. The heirs should account for the rents when the final settlement is made. The rents are to be considered as so much advance paid to the heirs by the executor on each of their portions.

The judgment of the lower court is correct, and it is affirmed.

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No. 992.

W. C. TEAL ET AL. VS. OSCAR S. LYONS ET AL.

A reconventional demand must set forth the claim of defendant with the same precision as would be required in a petition for the same cause of action, and a mere reference in his answer, to a former suit brought by the defendant, does not make the allegations of the petition in that suit a part of his answer.

When the offsetting claim set up by the defendant is wholly independent of, and distinct from the claim of the plaintiffs, the mere fact that *one* of the plaintiffs is in another parish from the one in which the suit is brought, will not authorize the defendant to plead his claim in reconvention.

Where property wrongfully attached is lost while in the sheriff's keeping, the owner is entitled to recover its full value from the plaintiff in attachment, and his sureties. If no malice is shown in the plaintiff, the owner is only entitled to full reparation for the actual damage he has suffered.

**A** PPEAL from the Eighth Judicial District Court, parish of Calcasieu.  
*Hudspeth, J.*

*Geo. H. Wells* for plaintiffs.

*L. Leveque* and *F. Perrodin* for defendants.

The opinion of the court was delivered by

MARR, J. On the tenth March, 1874, Lyons brought suit against Teal and Nicholls; and, under art. 240, number four of the Code of Practice, he caused process of attachment to issue, under which the sheriff seized one thousand logs, "more or less," lying in the Hickory Branch of the Calcasieu, and placed them in charge of a keeper.

Pending the suit a flood carried off the greater part of the logs, some of which were collected and secured by the keeper. Plaintiff represented to the court that the logs were perishable; and obtained an order that they be sold for cash, and the proceeds retained by the sheriff to abide the result of the suit. The sheriff advertised for sale 700 logs, "more or less;" and he actually sold 399, for \$540 96.

On trial on the merits, the court rejected the demand of Lyons



as in case of nonsuit; and dissolved the attachment, reserving to the defendants the right to sue on the attachment bond for damages. This judgment was affirmed on appeal, 28 An. 592; and this suit was brought against Lyons and Smart his surety to recover of them, *in solido*, the full amount of the bond, \$1125, and against Lyons alone the additional sum of \$343 56, damages for the wrongful issuing of the attachment.

Defendants plead the general issue; "and Oscar Lyons, one of the defendants, re-averring, as in his original petition, and praying as therein prayed for, they pray that plaintiffs' demand be rejected at their cost, and for general relief."

A few days after defendants offered an amended answer, alleging that plaintiffs were indebted to Lyons in the sum of \$736, and praying judgment for that amount, with interest, "as claimed in his original petition." This was followed by a second amended answer, alleging the indebtedness of plaintiffs to Lyons in the sum of seven hundred and thirty-six dollars, "which they hereby plead in reconvention." They also allege that Teal, one of the plaintiffs, is a resident of the parish of St. Landry.

Both these amendments were disallowed by the court; and we think correctly. A reconventional demand must set out the claim of defendant with the same precision as would be required in a petition for the same cause of action; and a mere reference to a former suit does not make the allegations of the petition in that suit part of the pleading in which it is so referred to. The indebtedness of Teal and Nicholls to Lyons is wholly independent of and distinct from the claim of Teal and Nicholls against Lyons and his surety for the wrongful issuing of an attachment. The suit was pending in the parish of Calcasieu, the residence of Lyons and Smart, and of Nicholls, one of the plaintiffs; and the fact that Teal, one of the plaintiffs, resided in St. Landry does not authorize the defendants to institute a reconventional demand against Nicholls and Teal. C. P. 374, 375.

The judgment of the district court was in favor of plaintiffs for \$540 96, the value of the logs actually sold by the sheriff, and \$75, for attorney's fees in the attachment suit; and on the same day, on rule taken by plaintiffs on the sheriff, and upon his confession, judgment was rendered against him for the \$540 96, less \$25, paid, with stay of execution for six months, the \$25 paid, and so much of the remainder as might be paid to be applied by plaintiffs to the satisfaction of the judgment in their favor against Lyons and Smart.

Both parties appealed from the judgment in favor of plaintiffs against Lyons and Smart; and plaintiffs, in answer to the appeal of defendants, pray that the judgment be so amended as to allow them the additional sum of \$751 25, the value of 601 logs, at \$1 25 per log, they

claiming that the whole number seized under the attachment was 1000, of which the 399 sold by the sheriff were part.

The testimony is not satisfactory as to the number of logs seized by the sheriff; and his keeper could not state the number. No doubt Teal and Nicholls had as many as 1000 logs; but it is by no means clear that there was that number at the mouth of the Hickory Branch; and none others were taken into possession by the sheriff or his keeper. The district judge heard the numerous witnesses; and he concluded that the plaintiffs were entitled to recover only for the 399 actually sold by the sheriff. The testimony leaves the impression on our minds that there must have been between 800 and 1000 logs in the lot seized by the sheriff. Some of the witnesses say not less than 1000, one says 900 to 1200. Whether all that were seized by the sheriff were carried off by the flood, or part only, we can not determine; but the greater part of them certainly floated off. Some of them were recovered, but strange to say, the testimony does not fix the number. The plaintiffs are clearly entitled to full reparation for the damage caused them by the wrongful issuing of the attachment; but they are entitled to nothing more, because there is neither allegation nor proof of malice or other bad motive on the part of Lyons.

The sheriff's return shows that he supposed he had seized 1000 logs; but he did not take the trouble to count them, nor to have them counted, and he qualifies the return by the words "more or less." When he advertised the logs for sale, he did not know how many had been or would be recovered; and he states the number to be sold at 700, "more or less." We think we may fairly assume that 700 will not be in excess of the number of which plaintiffs were deprived by the attachment: that is, the 399, actually sold, and 301, lost; and that plaintiffs are entitled to recover the value of the 301, at \$1 25 per log, proved to be the average price.

With respect to the 399 logs sold by the sheriff, plaintiffs might have pursued the sheriff for the proceeds in his hands, and have obtained judgment against him, with interest from the date of default on his part; and they might also have obtained judgment against Lyons and his surety for the value of these logs; but they could have but one satisfaction.

By proceeding against the sheriff, they ratified the sale made by him; and they could have claimed no more than the proceeds of Lyons and Smart, as the value of those logs. The sheriff was entitled to no delay or indulgence. He is bound to be always ready to pay, at once, to the party entitled, money received by him in his official capacity; and when plaintiffs, instead of compelling the sheriff to pay, immediately granted him a stay of execution for six months, they

Teal vs. Lyons.

treated and dealt with the money in his hands as their own; and subjected Lyons to the risk of the loss of that amount. Probably the sureties of the sheriff would claim to be released by this indulgence.

We think the defendants are liable for the value of the 700 logs, with interest from judicial demand, by which they were put in default; and \$75 for attorney's fees, subject to a credit of \$540 96, on the twenty-fourth March, 1877, the date of the judgment granting stay of execution to the sheriff.

The value of the 399 logs is fixed at \$540 96: the value of the 301, at the average price \$1 25, is \$376 25, in all \$917 21: to which add the \$75 for attorney's fees, the total is \$992 21, on which plaintiffs are entitled to legal interest from judicial demand, September 7, 1876: say up to March 24, 1877, six months seventeen days, \$27 12, in all \$1019 33. Deduct the \$540 96, March 24, there remains a balance of \$478 37.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to read as follows, and decree: That plaintiffs, William C. Teal and Lewis M. Nicholls, do have and recover of and from the defendants, Oscar S. Lyons and William W. Smart, his surety in the attachment bond, *in solido*, the sum of four hundred and seventy-eight dollars and thirty-seven cents (\$478 37), with interest at five per cent per annum from the twenty-fourth March, 1877, until paid: and that, as thus amended, the said judgment be affirmed, with costs.

No. 1019.

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## PARISH OF IBERIA VS. R. A. CHIAPELLA.

Property situated within an incorporated town, and the inhabitants of the town, are subject to the imposition of property and license taxes by the police jury of the parish, unless specially exempted by some act of the Legislature.

**A** PPEAL from the Second Justice's Court, First Ward, parish of Iberia. *Ratier, J.*

*W. F. Schwing*, District Attorney, for plaintiff and appellant.

*Jos. A. Breaux* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. Can three licenses and three taxes be imposed and levied—within the limits of an incorporated town—on a retail merchant residing in that town—one by the State, one by the parish and one by the authorities of the corporation? This is the question presented in this case.

The defendant is a resident of the town of Jeannerette, which was

incorporated by an act of the Legislature, approved on the 15th of March 1878, and that town is a portion of the parish of Iberia. He has paid to said town, as retail merchant, a license of fifteen dollars, and—besides—a five-mill tax on the assessment of his stock in trade. He declines to pay to the parish of Iberia an additional tax and an additional license. He contends that there is no law which expressly authorizes the police jury to levy a tax on “stock in trade,” and that he can not, justly, be compelled to assist in defraying the expenses of two local governments, that of the town and that of the parish.

Under section 2743 of the Revised Statutes, “police jurors have authority to levy such taxes as they may judge necessary to defray the expenses of their respective parishes, and their jurisdiction extends over all the parts of said parishes, not expressly exempted.”

15th A. 445.

In the case of Victor Maurin et als. vs. the Tax Collector of Ascension, this court said: “the question in this suit is whether or not parish taxes can be collected from owners of property situated in an incorporated town, when such property is not expressly exempted by law from such tax, and the police jury is vested with power to assess taxes upon the ordinary objects of taxation.

“We consider this not an open question. 13 A. 420—19 A. 99. Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation will reach such property.”

25th A. p. 445.

“That question is one of intent, and in ascertaining such intent it will not be presumed that the Legislature intended to restrict or diminish the power of taxation delegated to any subdivision of the State, unless such intent be plainly expressed.”

Burroughs on Taxation, p. 387–388. 9 A. 305. 11 A. 68. 20 A. 283. 26 A. 151.

In the act incorporating the town of Jeannerette, no such exemption is to be found, and—it is probable—the statute of 1878 cited by defendant and directing the levy of a tax in and out of incorporated towns, to defray the expenses in criminal proceedings, was passed for the sole purpose of subjecting to that special tax the towns which—previously—were exempt from such taxation. The repealing clause of the statute so indicates.

Act of 1878, p. 144.

Defendant complains that the tax and license thus imposed upon him and his property are not equal and uniform. They are, so far at least as the parish of Iberia is concerned; and—if any one of the three

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Parish of Iberia vs. Chiapella.

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licenses and taxes were unconstitutional, it would be the last of the three, that imposed by the newly incorporated town.

We think—with a French economist—that “taxes should be like those light vapors which the sun draws from and returns to the earth in fertilizing dew,” and entertain no doubt that, on proper application, the Legislature would not hesitate to extend to the town of Jeannerette the advantages and exemptions which have been extended to nearly every town of the State. Until then, the law must be applied as it is.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the parish of Iberia do have judgment against and recover of R. A. Chiapella the sum of twenty five dollars, amount of his parish license and tax for the year 1878; and the lien and privilege securing the payment of said amount is hereby recognized: the costs in both courts to be paid by defendant.

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No. 1023.

## SUCCESSION OF JACOB ANSELM. OPPOSITION OF A CREDITOR.

The filing of an amended opposition to a tableau of distribution will not be permitted, when it prays the court to do the very reverse of what the same opposer. in his original opposition, has judicially admitted ought to be done.

**A** PPEAL from the Parish Court of St. Landry. *Fontenot, J.*

*H. L. Garland* for administrator and appellant.

*B. A. Martel* for opponent and appellee.

The opinion of the court was delivered by

MANNING, C. J. Jacob Anselm died in 1862, and Cleophas Comeau was appointed his administrator the following year. No tableau of classification of the debts, nor of distribution of the assets, of the succession was made until 1872. Meanwhile Charles Thompson had sued the succession upon certain notes of the deceased, given for the purchase price of a frame building, and had obtained judgment for eleven hundred and eighty six dollars and 37 cents, with interest for several years, subject to a credit of \$250, with recognition of his privilege as vendor upon the fund in the administrator's hands, which was produced by the sale of the building. All the property of Anselm had been sold under order of court for the payment of debts, and this building of which Thompson was the vendor to him, brought seven hundred dollars at the succession sale.

On appeal, the judgment for the moneyed demand was affirmed,

but the recognition of the vendor's privilege was stricken out, and the case was remanded to ascertain whether it had been preserved.

When examined on the trial of this opposition, it was ascertained the privilege had not been recorded, and was therefore lost as to third persons—other creditors of the succession—who were contesting Thompson's claim to the fund. The administrator did not place Thompson on his tableau as a privileged creditor, but after distributing the funds among the privilege and mortgage creditors whom he did recognise, apportioned what was left among the ordinary creditors, so that Thompson was allotted only \$340.40. He opposed the tableau, because he was not placed thereon for the amount of his judgment, with a privilege on \$700, the fund produced by the sale of the building, to the exclusion of all other creditors; and prayed that the tableau be amended in that respect, and as thus amended, that it be homologated. This opposition was filed in March 1872.

Four years later, in February, 1876, Thompson presented another opposition, or amended the original, pleading prescription to all or several of the mortgage notes of deceased, which had been recognized on the tableau as mortgage notes, and among the holders of which, the administrator had proposed to distribute the funds in the manner already stated. The maintenance of this plea would of course so far diminish the consumption of the funds of the estate by the mortgage claims as to leave probably enough to pay the ordinary creditors in full.

Objection was made to the filing of this amended opposition upon the ground that it changed the issue, and altered the substance of the demand in opposition, but the court overruled the objection, and permitted it to be filed, because the plea of prescription can be filed at any time. The administrator reserved a bill to this ruling.

The true ground of objection to the filing of the amended opposition is, that it is in contradiction to the original—that what it prayed the court to do, is the reverse of what the same party had judicially admitted ought to be done. The concluding sentence of the original opposition was, a prayer that the tableau should be homologated after it was amended in the single particular mentioned, and therefore the opponent had prayed that all these mortgage notes, classified and recognised on the tableau as valid and subsisting claims, and as entitled to certain specified portions of the assets, should be paid in the manner, to the extent, and with the fund, set forth on the tableau of distribution. All that the opponent complained of then, was the refusal of the administrator to admit the existence of his privilege upon a certain fund, and thereby assure to him the whole of that fund. He opposed only that feature of the proposed distribution of assets, but if he had gone no farther, the plea of prescription would have been available to him. He

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Succession of Anselm.

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could have made it, and if he could have sustained it, his claim was safe. But he expressly prayed that, after the tableau was amended in the one particular, every thing upon it should be approved. And the mortgage notes were on it, classified in their rank, and assets assigned to them sufficient for their payment.

It is indisputable that prescription can be pleaded even here, at any time before a cause is submitted to the Court, but the question here is, not as to the time when prescription may be pleaded, but whether that, or any other plea, can be heard which runs counter to what the pleader has in the same contestation judicially demanded of the Court to do. It has been uniformly held that a party is bound by his admissions made, and demands preferred, in judicial proceedings. Civil Code art. 2270 new no. 2291.

The judge below amended the tableau in sundry particulars. There was no opponent but Thompson, and some of the amendments made were not prayed. There was no contest over the items, as the administrator had ranked them. A tableau or an account can only be amended in the items opposed. If all parties agree that they shall remain as classified, the Court need not disturb them.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and that the tableau presented by the administrator is now approved and homologated, and that the opponent pay the costs of his opposition in the lower court, and of this appeal.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF LOUISIANA,  
AT  
MONROE.

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JULY, 1878.

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JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,	} <i>Associate Justices.</i>
HON. A. DEBLANC,	
HON. W. B. EGAN,	
HON. W. B. SPENCER,	

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No. 782.

EDWARD NALLE VS. T. W. BAIRD.

On the trial of the exception of no cause of action, the Court can consider only the allegations of the petition, and the exhibits referred to, and made part thereof. No recovery can be had against the surety on a release bond, given for the release of sequestered property, on which the plaintiff claims a lien, where the judgment is a merely personal one against the principal on the bond, containing no recognition of the plaintiff's lien or privilege on the property released, nor decreeing a restoration of the property to the plaintiff.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Parsons, J.*

*Bussey & Morgan* for plaintiff and appellant.

*Todd & Brigham* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Nalle brought suit against his lessee, F. M. Grant, to recover the rent of a plantation for two years. In the petition he claimed the lessor's privilege on the crop and movables found on the premises, which he caused to be sequestered; and he prayed for judgment, "and

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that his privilege and right of pledge be recognized, and that the property seized be sold to pay his debt."

Grant procured an order under which the property sequestered was released on his giving bond, with Baird as his surety, in favor of Nalle, in the amount fixed by the order of the judge, the condition of which is "if the said *plaintiff* shall faithfully present the said property, or its value, provided judgment should be rendered against him, then this bond to be null and void, otherwise to remain in full force and effect."

Nalle prosecuted his suit to judgment; which was rendered for the whole amount of the rent due, subject to certain credits, and which is entirely silent as to the privilege and right of pledge claimed in the petition. Execution issued on the judgment, the result of which was that the sheriff found no property, after demand made of Grant to point out the property sequestered, and to point out other property to satisfy the writ. Thereupon this suit was brought against Baird, the surety in the release bond.

Baird excepted that the petition discloses no cause of action; and that no liability has attached to him, for the reason that no cause of action could accrue against him as a judicial surety, until the necessary steps have been taken to enforce judgment against the principal, "which has not been done in this case."

The Judge of the District Court maintained the first ground of exception, and dismissed the suit, without passing upon the second ground: and plaintiff appealed.

On the trial of the exception the defendant offered in evidence, without objection, the record and proceedings in the original suit, Nalle vs. Grant; but, on an exception that the petition discloses no cause of action, the Court can consider only the allegations of the petition, and the exhibits referred to and made part of the petition. The release bond is the only part of the record which is made part of the petition. The plaintiff states that he recovered judgment against Grant, that he caused *feri facias* to issue on that judgment: that demand was made of Grant to deliver the property that was sequestered, "and he failed and refused to deliver said property to the sheriff, and demand was then made upon him to point out other property. \* \* \* and that he failed to point out other property,, and plaintiff knowing of no other property, and the sheriff being unable to find property belonging to Grant \* \* the writ was returned *nulla bona*, and in no part satisfied."

The release bond is in no respect in conformity with the Code of Practice. Article 279 requires the bond to be given to the sheriff. This bond is in favor of the plaintiff. Article 280 prescribes the condition of the bond, that defendant shall not send away the movables sequestered out of the jurisdiction of the court; that he shall not make an

improper use of them; "and that he will faithfully present them, after definitive judgment, in case he should be decreed to restore the same to the plaintiff."

It is well settled that judicial bonds must be construed with reference to the law or the order of the court under which they are given. Perhaps it might not be material, so far as the liability of the surety is concerned, that this bond was not given in favor of the sheriff, as the law requires; and perhaps we might substitute, in the condition, the word *defendant* for *plaintiff*. But if we had the authority to change the condition in any respect, we should be compelled to add the clause, "in case he should be decreed to restore the same to the plaintiff."

The release bond takes the place of the property; and the law intends and requires that the sheriff shall take the bond, upon his official responsibility. He must, at his peril, see that the sureties are good and solvent. He must return the bond into court, and assign it to the plaintiff, who is allowed twenty days within which to object to the sufficiency of the security; and if it be found insufficient on such objection, the sheriff shall be liable as surety on the bond. C. P. 225, 226, 259, 279. It is the business and the duty of the sheriffs to conform to these requirements of the law; and their failure to do so might subject them to liability for the value of the property sequestered.

If we take this bond as it is, the condition is absurd, and no recovery can be had upon it. If we reform it, we must make it conform to the requirements of article 280; and in that case the surety would be liable only in the event that the defendant should be decreed to restore the property to the plaintiff. It is not alleged, it must therefore be assumed that it is not true, that any such decree was rendered in the suit in which the bond was given. The judgment is purely *in personam*, against Grant, the lessee, for the rent due; and the lessor's privilege and right of pledge are wholly ignored.

And here a distinction must be observed. A lessor might sue his tenant for the rent, and fail to sequester or to seize provisionally the property subject to his privilege and right of pledge, or to pray for a recognition of his rights. This would not impair his right to seize the property, and to subject it, if still on the leased premises, as effectually as if he had sequestered or seized provisionally *in limine*. But where the plaintiff in a suit demands the recognition of his privilege and right of pledge, and allows judgment to be rendered for the debt only, without mention of the accessory rights demanded, the judgment is conclusive against these rights.

Now, the surety in a release bond is entitled by law to full subrogation to the rights of the plaintiff; and if the plaintiff allows a judgment to be rendered by which his rights and privileges on the property are

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Nalle vs. Baird.

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lost, this of itself would discharge the surety to the extent of the value of the property. See *Hill vs. Bourcier & Pond*, 29 An. 841.

We think the petition fails to disclose a cause of action against Baird, the surety, because it fails to allege that the defendant was decreed to restore the property to the plaintiff. Where the suit is to enforce a privilege and right of pledge, the usual formula is to decree in favor of plaintiff the debt demanded, with lien and privilege, and in cases of rent, with lessor's right of pledge on the property sequestered or provisionally seized. This would be a decree, in effect, requiring the defendant to restore the property in order that it might be subjected to plaintiff's rights. If the plaintiff were the owner of the property, the decree would declare him to be the owner, and decree that it be restored to him; but without a decree which, in effect, condemns the defendant to restore the property, the surety in the release bond is not legally liable.

The judgment appealed from is in accordance with our views of the law; and it is, therefore, affirmed with costs.

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### No. 803.

ED. J. FORSTALL & SONS vs. BOARD OF LIQUIDATION, THE STATE INTERVENOR.

As to the *bona fide* holders of the bonds issued by the State in the year 1828 in aid of the Consolidated Association of the Planters of Louisiana, the State is the principal and sole obligor on those bonds, and such bonds are entitled to be received by the Board of Liquidation in exchange for the new consolidated bonds of the State.

**A**PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

*Breaux, Fenner & Hall* for plaintiffs and appellees.

*H. N. Ogden*, Attorney General, for respondents, intervenors, and appellants.

The opinion of the court was delivered by

EGAN, J. This is a proceeding by mandamus to compel the funding of certain bonds of the State of Louisiana, issued in aid of the Consolidated Association of the Planters of Louisiana, under article number 19 of 1828, and of certain interest coupons, amounting at the time of the application to \$79,927 50. These bonds and coupons are of the same class and series with those in the case of *Lesassier and Binder vs. the Board of Liquidation*, decided by us in March last, and not yet reported. In obedience to the view taken by this court in that case, the Board was proceeding to fund the bonds, etc., in question in this case, and had actually taken all the preliminary steps for that purpose when they

stopped, as we are informed, in consequence of their interpretation of a dictum and the opinion of the majority of the court in the case of the N. O. Pacific Railway Company vs. Francis T. Nicholls, Governor, et al., recently decided by us in New Orleans. We do not, however, consider this important under the view we have taken of the present case otherwise. In the Lesassier and Binder case we copied one of the bonds in the opinion, and it is unnecessary now to do so again. By reference to that case and to the act under which they were issued it will appear that the bonds in question are the absolute and unconditional promises of the State of Louisiana to pay the same, and *that the State is the sole obligor* in the bonds. They are signed by the Governor, Derbigny, and countersigned by the Treasurer, Gardere, on behalf of the State, in accordance with the terms of the act under which they were issued, and by no one else; and, as was said in the Lesassier and Binder case, whatever may be the relation between the State and the association *as between themselves*, by no possible interpretation can the State be considered any thing less or other than the principal, and indeed the sole obligor upon the bonds, as to the holders thereof. The fact that the act made them *transferable* by the indorsement of the president and cashier of the association no more modified or changed the obligation of the State than if they had been drawn payable to bearer, or had been the obligations of any individual or private person. Indeed, it is contended, and it appears with great show of reason, that the indorsement under the act by those officers for the mere purpose of transfer of title created no obligation on the part of the association, as appears to have been expressly decided by the Supreme Court of the United States in two similar cases quoted in the brief of relators' counsel, to wit: Curran vs. Arkansas, 15 Howard, 317; and Chamberlain vs. St. Paul, 2 Otto, 300.

If the association is bound, it would seem to be not upon the bonds in question, but by virtue of a new and independent contract or obligation, assumed by it in favor of the holders, by way of guaranty of their payment, in order to give them greater currency and credit, no doubt, and which was not only assumed subsequent to the execution of the bonds by the State, but formed no part of this obligation, as will be seen by reference to the opinion in the Lesassier and Binder case, into which it also is copied. There is here no obligation by which the State binds herself for another already bound to satisfy the obligation in case that other does not. These are no accessory but original and principal obligations, not payable contingently, but absolutely and at all events. They are unquestioned and unquestionably debts of the State of Louisiana, possessing all the requisites and characteristics, as we held in the Lesassier and Binder case, which entitled them to be exchanged for con-

solidated bonds, under the provisions of the funding bill and its amendment. No distinction is made against them by the broad and general terms either of the act or of the constitutional amendment. By the third section of the original funding act it is provided that upon application by the holders new consolidated bonds "*shall* be exchanged by the Board of Liquidation for *all valid* outstanding bonds of the State." Those now under consideration are both valid and outstanding. The fact that they were at one time classed by the Auditor in his report as contingent liabilities of the State could not and does not change their form or obligation. Neither does the amount of issues of consolidated bonds provided for in the funding bill, of which it need only be remarked that if found insufficient that is a matter under legislative control, and, at all events, no such ground of defense is set up in the present case. So far as appears, and we are informed by the Auditor's report and this record there is no obstacle on this score to the funding of the relators' bonds and coupons. It has been argued with great earnestness that there are very marked distinctions between the bonds issued to the Consolidated Association and those issued to or on account of the Citizens' Bank—a matter we are not called on to determine in this case, however.

The judgment below made the mandamus peremptory. It was correct, and is affirmed.

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#### DISSENTING OPINION.

SPENCER, J. For the reasons stated in the case of "The State ex rel. N. O. Pacific Railroad Company vs. F. T. Nicholls, et al.," I dissent from the decree in this case.

In my opinion it is matter of no moment whether the bonds issued to the Planters' Association were or not absolute liabilities of the State, or merely "contingent" and conditional. It is clear to me from the proceedings of the Legislature in adopting the funding bill and in proposing the amendments of the Constitution relative thereto, that the Citizens' Bank bonds and the Planters' Association bonds were excepted and excluded from the funding scheme. The report of the Auditor, referred to in the Pacific Railroad case, classing these Planters' Association bonds as "contingent" liabilities, does not, of course, make them "contingent," and in that decision we refer to them as "contingent" simply as a convenient mode of designating those bonds which were excluded from the proposed funding process, and because under that appellation they figured on the Auditor's report, which served and was adopted as the basis of the funding bill and the accompanying amendments. I hold that these bonds can not be funded because the Legislature did not intend to embrace them in the scheme, and not because they are or not in fact

Forstall &amp; Sons vs. Board of Liquidation.

"contingent" debts of the State. This question was not raised or brought to our notice in the *Lesassier* and *Binder* case, and in that case we simply decided that these bonds were absolute valid debts of the State, and I still think they are; but for the reasons stated they are not fundable.

MANNING, C. J. I concur in the dissent of Mr. Justice SPENCER.

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No. 772.

THE STATE vs. THOMAS ROSS.

Where the regular venire has been exhausted without completing the jury, it is the duty of the judge, if the accused shall so request, to order the sheriff to call the absent members of the regular panel at the courthouse door before the summoning of talesmen to complete the jury.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*W. N. Potts*, District Attorney, for plaintiff and appellee.

*David Todd* and *Robert Ray* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Defendant, having been indicted and convicted of murder, without capital punishment, appeals and has assigned various grounds of reversal. It will be necessary to notice but one of them.

It appears by bill of exceptions that in impaneling the jury there were a number of the regular venire who failed to answer to their names when called by the sheriff at his desk inside the courthouse; that without completing the jury the panel was exhausted, and, thereupon, the court ordered the sheriff to summon talesmen to complete it. The defendant requested, thereupon, that the court order the sheriff to call the absent regular jurors at the courthouse door, and objected to talesmen being summoned until that was done. The court overruled the objection and refused the request, stating as a reason that he had announced previously that jurors would be called at the bar, and not at the door, and must be present in the court-room.

We think the judge should have ordered the absent jurors to be called at the door of the courthouse, if required by the accused. He had the legal right to be tried by a jury from the regular panel, if it could be procured without unnecessary delay. Talesmen are only to be taken in the event this can not be conveniently done. We think it was a reasonable request, one easily and speedily complied with, occasioning no delay in the cause, and in nowise prejudicing the rights of the State.

It is a customary and usual practice to repeat the call at the door of

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## State vs. Ross.

the courthouse, and one which should not be refused if required by the accused, in order to verify the absence of the jurors. It is easy to see that an impartial trial is more likely to be had by a jury taken from the regular panel by lot than by talesmen selected by the sheriff. In so grave a case as this we are not disposed to sanction the non-observance of any of the usual forms tending to secure a fair trial. The judge might very well notify and require jurors to remain in the building, and punish them for disobedience; but the fact that he had so notified them should not deprive the accused of having so reasonable a verification of their absence as that asked in this case.

It is therefore ordered and decreed that the verdict and sentence appealed from be set aside, and that this case be remanded for new trial, and to be proceeded with according to law.

## No. 773.

## THE STATE VS. LOU. OUTS.

It is not necessary that the accused, who is being tried for a felony, should be present in court, whenever any step, no matter how insignificant, is taken in the case.

Oral observations addressed by the judge to the jury after the reading of his written charge to them, and which are not alleged to contain any error, will not furnish ground for a bill of exception when not objected to at the time they were delivered.

In a prosecution for forging a certain instrument evidence is admissible to show that the accused was in possession of the instrument on the day of its date, and that she presented it in payment of goods purchased by her.

Forging an order for merchandise is a crime under the law of this State, and punishable as such. Revised Statutes, sec. 833.

**A**PPPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*W. N. Potts*, District Attorney, for the State.

*Robert Ray* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was convicted of forgery, and sentenced to imprisonment at hard labour for two years. She assigns for error, that the minutes of the court shew that the case was set for trial Dec. 15, 1877, and do not shew that the accused was present in the court room at that time—that the minutes shew the case was on that day continued without her being present—that the minutes shew a motion for a new trial was made May 2, 1878, and do not shew her presence then—that the minutes shew the motion for a new trial was overruled May 13 and do not shew that she was present. This assignment states that it is

based on Christian's case, 30 Annual, 367, the syllabus of which is, that when the record of a criminal cause fails to shew that the accused was present at any time from the moment of his arraignment to his sentence, the judgment and verdict will be annulled.

Let us see if the record of this cause fails to shew the presence of the accused, and when. The minutes of May 21, 1877 shew that the accused was brought into court, was arraigned, and pleaded not guilty. The minutes of May 1, 1878 shew that she was brought into court, the jury impanelled, the case tried, and verdict rendered. The minutes of May 13 shew that she was present when the new trial was moved, and the arrest of judgment prayed. "Now comes the defendant in open court &c" is the opening sentence of the motion in arrest. The minutes of May 17 shew she was in court when that motion was tried and overruled, and she was sentenced, and her appeal was taken. The record, instead of failing to shew that the accused was present at any time between arraignment and sentence, shews affirmatively that she was in court at every stage of the trial when her presence was needful. In the old English cases, which were very strictly followed in the early jurisprudence of America, it was rigorously held that the prisoner must be personally present in court whenever any step was taken in his cause, if the prosecution was for a felony. The early American courts, in adhering blindly and tenaciously to this rule, lost sight of the reason upon which it was founded.

Formerly, a person accused of crime in England was not permitted to have counsel. The barbarous instincts of that people had disappeared under the humanizing influences of a later civilization long before this cruel prohibition was expunged. Practically it had been ignored. At first, the English judges modified the rigour of the rule by watching over the safety of the prisoner themselves, and later, they disregarded the prohibition and allowed counsel, but the Parliament waited until long after the present century had begun, and until the American courts had swung round to the opposite idea, and assigned counsel to prisoners when they had none, before the prohibition was formally removed. As no counsel was allowed in that country in those days to represent a prisoner, and protect him, and he could only defend himself, the courts then held that he must be in court whenever any step was taken in his cause, however insignificant or unimportant. It is still universally required that he must be present when the verdict in a case of felony is received. State vs. Ford, 30 Annual, 311.

There were two bills of exception taken, the first to the alleged omission of the judge to reduce his charge to writing when requested by the prisoner's counsel. The judge did write his charge, but it appears after delivering it, he added some oral observations, to which no objection was



made at the time. It is not objected now that the additional oral observations contained any error. The judge complied with the demand, and if there were any objection to his saying any thing to the jury beyond what he had written, it should have been made then.

The second bill is to the reception of the testimony touching the uttering or publishing the forged order, because it was not responsive to the charge. Forgery is quite distinct from the offence of uttering a forged paper, and while the latter is necessarily an act publicly done, the former is secretly performed. The proof of the latter is rarely to be obtained except circumstantially. The testimony admitted on this trial was as to the possession by the accused of the forged order on the day of its date, and its presentation to pay an account for goods which she had bought, and which she was told she could not take away without such an order as was subsequently forged and presented. The proof was a link in the chain of evidence necessary to establish the commission of the crime charged, and was admissible on that ground.

The prisoner also moved in arrest of judgment, that there is no law in this State against forging an order for merchandise. The reading of Rev. Stats, sec. 833 will dispel that delusion.

The judgment of the lower court is affirmed.

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No. 781.

MOORE & COLEMAN VS. MARY F. RUSH.

A married woman duly authorized but not coerced by her husband, who executes a mortgage on her property to secure the payment of her own debt, is bound by the mortgage.

Parol evidence is admissible to prove that a written contract was signed under the influence of force or violence.

A married woman is not estopped from disproving the averments of an authentic act executed by her, and which she alleges she was forced to sign.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*W. W. Farmer and Cobb & Gunby* for plaintiffs and appellants.

*Potts & Hudson and Wells & Williams* for defendants and appellee.

The opinion of the court was delivered by

MANNING, C. J. The defendant is a married woman, separated in property from her husband. The judgment of separation was rendered at her instance in 1873, upon her suit for the recovery of her paraphernal claim. Her husband was at that time a member of the commercial firm of Balfour & Co., at Rayville. In part satisfaction of his wife's judgment, rendered on May 8th. he conveyed to her on the 9th. all of

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his property; viz an undivided interest in certain lots of ground and improvements in the village where they lived, and also his share and interest in the mercantile firm of Balfour & Co. Thereupon Mrs. Rush became a partner in that firm, and her husband went into bankruptcy.

Britton, Moore, and Coleman were the New-Orleans factors and correspondents of Balfour & Co. By March 1876, the Rayville firm had become indebted to the New-Orleans firm in the sum of \$4,841 00, and suit was instituted for its recovery. Pending that suit a compromise was made, by which Balfour paid or satisfactorily settled with the plaintiffs therein for his part of the debt, and Mrs. Rush gave her two notes for her part of it, and executed a mortgage to secure them, and also pledged other notes of other parties, owned by her as collateral. Her notes, thus given, did not mature until nearly one and two years after their date.

These notes were not paid, and the present plaintiffs, now holding them under a transfer from their former firm (Britton having retired), bring this suit to obtain judgment for the amount of the notes, and a foreclosure of the mortgage, and a sale of the pledged notes. The defendant resists their demand upon the grounds that the notes were given for the husband's debt, and that she signed them, and the mortgage, under marital coercion.

There is no testimony whatever in support of the first ground. On the contrary, the proof is complete that the debt was the wife's, contracted in her capacity as a public merchant.

The testimony relative to the second ground is conflicting, but we have no difficulty in extracting the truth from it. Nicholas D. Coleman, one of the plaintiffs, as a witness states that, being in Rayville the month following the institution of the first suit, he was requested by the husband of the defendant to compromise that litigation, and that he was averse from taking that course, but finally yielded to his entreaties. Dr. Rush was acting as the agent of his wife, and was representing her in her commercial affairs. By the compromise resulting from that negotiation, the wife obtained two years time for the larger part of her debt, and the plaintiffs obtained the security of a mortgage. Mr. Coleman was present when the mortgage was executed. Mrs. Rush had recently been confined, and the signatures were made in her bed-chamber, she being still lying-in. She sat up in her bed, while Mr. Coleman handed her a book upon which to place the paper, and a pen with which she wrote her name. She said to him that the arrangement met her entire approval, and would enable her to pay the debt without detriment to her property, and after the signing was completed she added that she had simply performed her duty in securing his firm against loss.

The defendant's witnesses were herself, her sister, her nephew, and

a coloured woman, her nurse. They narrate the incidents of a scene that preceded the execution of the mortgage and notes, when the husband is represented as inquiring whether Mrs. Rush intended to sign the papers, which she vehemently declared her determination not to do, giving vent to imprecations in attestation of her firm resolve. Her obstinacy was subdued only when her husband threatened he would go off, and take the two eldest children with him, if she did not sign. Maternal tenderness was victorious over the instinct of property preservation. These witnesses represent the notary as reading the act of mortgage in her presence with great rapidity of utterance, and impart some accessorial ornamentation to the scene. Mrs. Rush was so feeble that she could not raise her body so as to sit upright on the bed. Mr. Coleman raised her body, and supported it with his own, or with his arms, and guided her hand while the signature was traced. She had been daily visited by her physician, who had alleviated her pains by copious opiates, and she was thus mentally and physically incapacitated for transacting business intelligently.

Mr. Coleman, the notary, and the physician emphatically contradict this story. The notary was careful to read the mortgage audibly and distinctly in Mrs. Rush's hearing. Her husband suggested to him to dispense with the reading, but he would not. "I was on my guard, he says, and was careful to read it clearly and distinctly, for I expected that they would try to take some advantage of it." Mrs. Rush did not object to any part of it, or express any unwillingness to sign it. She signed without help from any one, except that Mr. Coleman dipped the pen in the ink and handed it to her, after having given her a book on which to write.

The physician says she was delivered on the 21st of March, and he made his last visit to her on the 24th. She says her child was born on this last day. He can not state positively, but he thinks he did prescribe opiates, but not an unusual quantity of them.

Mr. Coleman says he did not touch her person. She sat upright without assistance, wrote her signature, and manifested no symptom of disapprobation in his presence, but on the contrary thanked him for the consideration he had shewn her. On parting he shook hands with her. There is nothing to shew that Mr. Coleman was aware, or suspected, that the husband had used any influence over his wife to induce her to sign, nor is it important that knowledge of it should be brought home to him. If the fact of threats or violence were established, it would matter little whether he knew it or not. A contract produced by either of these causes is void, although the party to be benefitted by it, was not the author of them, or was ignorant of them. Civil Code, art. 1846 new no. 1852. But if the contract has been approved after the violence or dan-

ger has ceased, the previous threats will not invalidate it, and there are other instances mentioned in the Code, wherein such threats will not affect it. arts. 1849, 1852. new nos. 1855, 1858.

The testimony however satisfies us that the husband's threats, if he used the expressions attributed to him by the wife and her witnesses, were either empty menaces, not to be performed, and were so understood by his wife, or that what he did say was totally different from those expressions. Other witnesses say he told her if she did not sign the mortgage, her property would be taken away from her, because the plaintiffs would press their suit (the first one) to a judgment, and then an execution would sweep it all. Feminine imagination, that can distort the polite act of a gentleman handing a pen to a lady, into mounting on the bed and using his own body as a support to hers while she wrote, is quite capable of misunderstanding words spoken with such surroundings. Even if the credibility of the witnesses were equal, those of the plaintiff are supported by circumstances—are in accord with the probabilities, and therefore are entitled to the preponderance.

Three years before the first suit of the plaintiffs, Mrs. Rush had become satisfied that her husband's affairs were so deranged that prudence required her to assert her paraphernal rights. Even at that early date, she evinced her independence of marital constraint by instituting a suit against him for \$1,740, and alleged that his debts to others were so large, that promptitude of action was necessary, and she prayed and obtained a judgment for all that she asked. No sooner was this judgment rendered, than she surpassed the celerity with which the law works through the medium of a *feri facias*, and displayed such a mastery over her debtor that she extorted from him a conveyance of all that he had to satisfy only a part of her judgment, while he took refuge from the pursuit of less vigilant and less determined creditors under the shelter of a discharge in bankruptcy. It is not credible that a woman, who can thus bend to her will a recalcitrant debtor, would on the very next occasion, when the safety of her property was involved, have become so complaisant as to yield to his entreaties or his threats that which she had wrested from his improvident hands.

Nor is it more credible that a man, who had flaunted his certificate of bankruptcy in the face of impotent creditors, and who is cognisant of and authorizes his wife to make the defence she does present in these pleadings, would have been so sternly and strongly impelled by the impulses of honesty as to endeavour, or to desire, to compel his wife to do what a proper regard for her own obligations should have prompted her to do of her own volition.

There is no pretence that the debt was not, and is not, owing to the plaintiffs. The allegation that it was the husband's, and did not enure

to the wife's benefit, is seemingly abandoned, and at any rate is disproved. She was in fact solidarily bound for the whole of the original claim, but Balfour paid a part—paid all that he ought to have paid, since in a settlement of the partnership, it was ascertained that Mrs. Rush, by paying that part of the debt which the notes now in suit represent, was paying also what she owed her partner. Nor is there any resulting injury to her from the execution of the mortgage, and the notes which it secures. Her debt was not increased. The time and terms of payment were made less onerous. The petition is wholly wanting in any allegation even of injury of any kind. She does not pretend in her pleadings that she has been damaged by the act which she seeks to annul. In her testimony, she says her credit was affected by the mortgage, and her ability to obtain supplies was lessened. In other words, that she obtained the dismissal of a suit wherein a judgment for this debt was imminent, which would have been followed by an execution to enforce its payment, and she injured her credit by substituting to this perilous situation, one in which she obtained one and two years' time, and assured the possession of her property, and the consequent ability to work it during that time.

The only bill of exceptions that need be noticed is that of the plaintiffs to the admission of the testimony of the defendant, and other witnesses, on the matter of violence or threats, on the ground that the averments of an authentic instrument could not be varied or contradicted by parol, and that the signatory of such writing is estopped in law and equity from denying or attempting to repudiate the transaction or compromise which is set forth in the writing.

The objections to the testimony were properly overruled. Where a married woman had expressly declared in a mortgage that the advances, secured in it, enured to her benefit, it was held that she was not estopped from shewing the contrary, and thus relieving herself from liability. *Patterson v. Frazer*, 5 Annual, 586. *A fortiori* must evidence of threats or violence, as the moving causes of her execution of the mortgage, be admitted, since their due proof would wholly invalidate the act.

The lower court sustained the defence of coercion, and rendered judgment against the plaintiffs. There is manifest error, and we must reverse it.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiffs have and recover of the defendant Mary F. Rush the sum of thirteen hundred and sixty four 87-100 dollars with eight per centum per annum interest thereon from February 16, 1877, and the further sum of two thousand one hundred and forty four 27-100 dollars with the same rate of interest thereon from February 16, 1878, and the additional sum of ten per centum upon

the aggregate of these two sums and interest, as attorneys fees, and the costs of both courts including six dollars as cost of copies. It is further ordered and decreed that the mortgage claimed by the plaintiffs is recognized upon the property described therein as operating thereon from its date, and is ordered to be executed, and that the notes, called the Barfield notes, pledged for the security of the payment of the notes of defendant, be also sold to pay this judgment.

Rehearing refused.

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No. 777.

THE STATE VS. ISHMAEL WILLIAMS.

Where in a criminal case, in which the defendant has waived a jury, the sentence pronounced on the defendant is not responsive to the decree signed by the judge, the judgment will be set aside and the case remanded.

The parish judge has authority to sentence the accused to imprisonment in the Penitentiary in criminal cases wherein the defendant has waived trial by jury.

**A** PPEAL from the Parish Court of Terrebonne. *Sidney, J.*

*Lucius F. Luthon* for the State.

*Van. P. Winder* for defendant.

The opinion of the court was delivered by

DEBLANC, J. The information filed against the accused charges "that Ishmael Williams, late of the parish of Terrebonne, on the 26th of May, 1878, did—with a dangerous weapon—to wit: a pistol, *and with intent to kill*, inflict a wound less than mayhem, etc."

The offence thus charged is that defined by section 794 of the Revised Statutes, and is punishable by imprisonment, with or without hard labor, not exceeding two years, nor less than six months, and by fine not exceeding one thousand dollars.

The accused waived the privilege of being tried by a jury, and, according to a statement which appears in the record, was found guilty *as charged*, and that is of having, *with a dangerous weapon and with intent to kill*, inflicted a wound less than mayhem. In the decree signed by the parish judge, he declares the prisoner *guilty of the crime of wounding less than mayhem*, and, nevertheless, condemned him to imprisonment at hard labor for the space of one year and to pay a fine of five cents.

The offence mentioned in that decree, which can be but that of wounding short of maiming, and without the intent to kill, is punishable by fine or imprisonment, or both, at the discretion of the Court, and—

under the restrictions imposed upon its discretion, the Court had no power to condemn the accused to hard labor in the penitentiary.

Revised Statutes, sections 796, 982.

The sentence pronounced on the prisoner is responsive to the charge laid in the information, but not to the decree *signed* by the parish judge, and—for that reason alone—is not sanctioned by law.

We consider it proper to say that the ground urged by defendant, “*that the parish Court has no authority to sentence an accused to imprisonment in the penitentiary,*” is not tenable. In criminal matters, when the prisoner waives trial by jury, the authority of that Court to pass such a sentence is incontestible.

Constitution of 1868, art. 87, 23 A. 600.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and this case remanded to the lower Court to be proceeded with according to law.

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No. 810.

W. C. WILLIAMSON vs. T. P. RICHARDSON, SHERIFF, ET AL.

The defendant in injunction is authorized to compel the plaintiff to prove the truth of the facts alleged by him, in a summary manner. It is not needful for the suit to be at issue, or fixed for trial, or called, before the rule on the plaintiff to prove his alleged facts can be tried.

When a debtor enjoins the execution of a judgment for any of the causes mentioned in article 739 of the Code of Practice, he is not permitted, on the summary trial of the rule on him, to prove the facts alleged by him, to introduce evidence of any thing but the particular cause in article 739 on which he has based his injunction.

No copy of the petition for the order of seizure and sale need be served on the debtor, but only the notice of the order.

The judge may grant an order of seizure and sale on a note which is prescribed on its face.

Damages will not be granted on the dissolution of an injunction when it is not certain that the plaintiff wilfully used the writ for delay, or merely to harass the creditor.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*Cobb & Gunby* for plaintiff and appellant.

*R. W. & R. Richardson* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The executors of J. P. Crosley obtained an order of seizure and sale of certain property of the plaintiff, for the payment of his note for over four thousand dollars, and upon service being made of the usual notice, he arrested farther proceedings by this injunction,

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52	603
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106	750

which was granted without bond. The allegations are that a boy of about fifteen years, the son of the sheriff, delivered to the plaintiff a paper purporting to be a copy of the order of seizure and sale, and notice, but that such service is illegal, not having been made by a person qualified to act as a deputy of the sheriff;—that no copy of the petition of the executors has been served on him, and that the note, upon which the order issued, is prescribed.

At the ensuing term of court, the defendants in injunction moved and obtained a rule upon the plaintiff to prove in a summary manner the truth of the facts alleged in his petition of injunction, and the rule was made returnable two days thereafter. Whereupon the plaintiff excepted to this rule, and the order of court thereon, for four reasons;—1. that the proceeding by rule was not authorized by law; 2, the delay for answering should have been ten days; 3, that the rule is so vague and indefinite that the plaintiff can not answer it intelligibly; 4, that the suit is not at issue, and has not been fixed for trial, nor reached in the call of the docket.

The law expressly authorizes a party enjoined to compel the party injunction to prove the truth of the facts alleged by him, in a summary manner. Code of Practice, art. 741. No delay is specified for the party enjoined in such rule. The trial must be summary. The rule is not vague. The language used is the same as that of the Code. It was not needful for the suit to be at issue, nor to have been fixed for trial, nor called. It would defeat the purposes of the rule, if instead of trying it in a summary manner, its trial should be deferred until the suit was at issue, or should be reached in its regular order on the docket. The plaintiff was correctly compelled to try the preliminary issue on the rule summarily.

It is also objected that the trial thus ordered was a violation of the rules of the court, because it was had during the 'motion hour.' That was the proper time, according to those rules, to try the summary proceeding.

The plaintiff, having been thus compelled to prove summarily the truth of the facts alleged by him, offered evidence to shew that his allegation touching the minority of the person who made the service on him was true. The defendants objected on the ground that when a debtor arrests a sale for any of the causes mentioned in art. 739 of the Code of Practice, (and this sale was arrested for the 8th. reason in that article, viz prescription) the debtor must, on the summary trial of such a rule as this, be confined to the proof of the particular cause, or causes, in that article, upon which he has based his proceedings in arrest. This objection is good. The purpose of these articles of the Code of Practice is, first to enable the debtor to arrest a sale of his property for certain



specified reasons, and to afford him the most complete facility to do that, directs the judge not to require any surety from him. art. 740. And the second purpose is to enable the creditor, who has been met in the execution of his process by these eight objections, or any of them, to avoid farther delay by compelling the debtor to prove them, and he can prove nothing else.

The second ground of injunction is, that no copy of the petition for the order of seizure and sale was served on the debtor. A copy of a petition is served when a citation to answer it is served. They go together. No citation is necessary in executory process, but only the notice of the order to the debtor. Dupuy v. Bemiss, 2 Annual, 509. Broughton v. King, Ibid. 569. Neither is service of a copy of the petition necessary.

The third ground is prescription, and upon this the ruling of the lower court is not in accordance with the early authorities. A question of prime importance is here presented, Can a judge grant an order of seizure and sale upon a note which is prescribed on its face?

In Union Bank v. Dosson, 7 Annual, 548 an order upon such a note was held to have been improperly granted. The court said, "as the obligation is *prima facie* prescribed, there must be authentic evidence of the interruption of prescription before the party can proceed *via executiva*," and this is mentioned approvingly in Fowler v. Beatty, 10 Annual, 275. The later practice has been to grant the order, leaving to the debtor to interpose the plea of prescription. We shall consider the right to issue the order in such a case as an original proposition.

The rule of the Code is, that courts can not supply the plea of prescription. art. 3426 new no. 3463. *Non constat* that every person, who can avail himself of it, will use it. It is a weapon that the courts can not furnish. It is rather a shield that the litigant must hold up for his own protection. When a judge refuses an order of seizure and sale upon a paraphed note, and a corresponding authentic act of mortgage, for the reason that five years have elapsed since the maturity of the note, by the terms of that refusal, he interposes the plea of prescription, for if the plea is never interposed, the note will always be collectable. If therefore it is beyond the judge's power to supply the plea, the order must be granted if the authentic evidence before him conforms to the requirements of the Code of Practice.

This case practically illustrates the propriety of this ruling, and the complete protection it affords to the debtor. He can oppose the plea to the creditor's demand by an injunction suspending the sale, (art. 738) and that all hindrance to his exercise of this right may be removed, he is dispensed from giving bond. The plaintiff has thus obtained his injunction, but when he claimed on the trial of this rule that the note

was prescribed, the defendant proved by an endorsement upon it that the debtor had waived prescription nine days before the full term of five years from its maturity. It was not prescribed therefore when the order was granted for executory process to issue, and the judge properly made the order. The fact that our law has expressly mentioned prescription as one of the eight causes for which the debtor can arrest the process by injunction without bond, shews that its intention was to leave to him the use of that plea, and not to allow the judge to interpose it.

We are asked to inflict damages upon the plaintiff in injunction for an abuse of the writ. It is not certain—it is not even probable—that he knowingly and wilfully used the writ for delay, or merely to harass the creditor. On the contrary the unsettled jurisprudence upon this particular question left him in doubt whether he was not pursuing the course which might receive the ultimate approbation of the court of the last resort.

We disappoint his expectations, but we shall not punish him because he cherished them.

The lower court dissolved the injunction without damages.

The judgment is correct, and is affirmed.

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No. 776.

THE STATE vs. S. W. CURTIS.

A criminal prosecution and conviction, based on a fatally defective information, or indictment, will not interrupt prescription of the crime charged.

**A**PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

*W. N. Potts*, District Attorney of the Fourteenth Judicial District, for the State.

*P. P. Carroll* and *John N. Healy* for defendant.

The opinion of the court was delivered by

**EGAN, J.** This is an information for breaking and entering a store-house in the night time, with intent to steal.

The only question which we deem it necessary to consider is the plea of prescription, which is alleged to have been improperly overruled. This information was filed on the twentieth of April, 1878, while the offense is charged to have been committed on the twenty-seventh of September, 1876. It was, therefore, clearly prescribed, unless some legal cause to the contrary is shown. The cause shown and alleged in the information is the institution of a former prosecution against the same defendant for the same offense within less than one year from the time of its commission. It appears that the accused was tried and found guilty under

the former prosecution, and on appeal to this court that the conviction was set aside and the prosecution dismissed for defects in the information; whereupon, the present prosecution was instituted.

We recently reviewed the authorities, and especially the *State vs. Cason*, 28 A. 40, relied upon by the district attorney, in which it was held by our immediate predecessors that although a *nolle prosequi* had been entered in a former prosecution for the same offense, the existence of the prosecution was sufficient to interrupt prescription. Such would certainly not have been the effect of the institution and voluntary abandonment of a civil suit; and we held in the case referred to, which is yet unreported, that no more did it interrupt prescription in a criminal case.

It has often and uniformly been held both in this State and elsewhere that in order to make a former conviction or acquittal available to the accused in a subsequent prosecution for the same offense the former proceedings and indictment must have been lawful. See 7 A. 256; *State vs. Foster*, 8 A. 290; 16 A. 400; *Waterman's Crim. Digest*, p. 227, sec. 45, *et seq.*, and cases cited. If such be the rule against the accused in a criminal proceeding where the courts and the law always lean "*in favorem libertatis*" it is difficult to perceive any good reason why the contrary should be held in favor of the State or the matter of prescription. It would seem hardly to be even-handed justice. None of the authorities relied on by the counsel for the accused bear upon the precise question in the present case, except Wharton's *Am. Crim. Law*, sec. 436 (a), under which in note (d) we find a reference to the case of the *United States vs. Slocum*, 1 Cr. C. C. 485, in which it was held that the finding of an informal presentment is not sufficient to take the case out of the statute; nor will a former indictment on which a *nolle prosequi* was entered; *United States vs. Bellard*, 3 McLean, 469. Such, too, we think has been the general practice and interpretation of the law in this State, and we think it correct. An illegal or void prosecution is equivalent to no prosecution, and under it the accused, on the one hand, is considered as having never been in jeopardy, while, on the other, it is without legal effect in favor of the State to interrupt prescription. We should have been better pleased had the question arisen when we had large access to authorities, but in view of the humanity of the law, and liberty of the citizen, and of the absence of any statutory provision similar to that in civil cases, and of any reference to authority to the contrary on behalf of the State, we are unwilling to sanction a practice liable to so great abuse and possible injury to the citizen,

It is therefore ordered and decreed that the verdict and sentence appealed from be and they are avoided and set aside; that the defendant's plea of prescription be maintained, and that he go hence without day.

No. 801.

## SUCCESSION OF HENRY PEARCE.

Their own public and expressed consent, and the consent of their master, were alone sufficient to give validity to a marriage between slaves in Louisiana, and from the moment of their emancipation such a marriage has secured to them and their posterity all the rights and privileges bestowed by the State on marriages authorized and sanctioned by its laws.

**A** PPEAL from the Parish Court of Morehouse. *Norwood, J.*

*Newton & Hall* for administrator and appellee.

*Todd & Brigham* for opponents and appellants.

The opinion of the court was delivered by

DEBLANC, J. Born in slavery, Henry Pearce remained a slave until the general emancipation which followed the war. In 1855, he and one Charlotte, who—as himself—was then a slave, were—with the consent of their masters and in presence of a large assemblage—married by a minister of the Gospel of their class, and lived as man and wife, and so acknowledged by all who knew them, until the death of Henry Pearce, in 1875.

They had nine children, eight of whom are under age. Those children were always recognized and treated by them as the issue of their marriage, and—by the death of their father, they and their mother have been left in necessitous circumstances. They have no means, no property. These facts are admitted.

It is also admitted that Pearce and Charlotte were not married otherwise than as herein stated: that neither of them could read or write, and they did not—by notarial act—confirm their marriage and acknowledge their children.

Considering their penniless condition, the administrator of Pearce's succession has allowed them the sum of one thousand dollars, and classed them in his account as privileged creditors for that sum. That proposed allowance is opposed by Silbernagel & Co, on the grounds:

1. That—when they married—Pearce and Charlotte were slaves, and that their marriage neither could nor did produce any of the civil effects which result from such a contract.

2. That they did not—in accordance with the Statute of the 5th of November 1868—ratify any private marriage which may have existed between them before their emancipation, and did not legitimate the children born of their cohabitation.

Two of the provisions of the act of 1868, referred to in the opposition, are in these words:

Sec. 1. That all private or religious marriages contracted in this State at any time previous to the passage of this Act, shall be deemed

valid and binding and as having the same force and effect as if said marriages had been contracted with all the formalities and forms prescribed by the laws then existing; *provided*, that at any time within two years from the date of this Act the parties having contracted such private or religious marriages shall by authentic act before a duly commissioned Notary Public, if they reside in the State, or before a competent officer if they reside in another State, or a United States Ambassador, Chargé d'Affaires or Consul or Vice-Consul, if they reside in a foreign country, make a declaration of their marriage, the date on which it was contracted, the names, sex and ages of the children born of such marriages, acknowledging said children as their legitimate offspring, and in accepting the benefit of this Act, bind and obligate themselves to perform all the duties and to assume all the obligations imposed by existing laws in relation to civil marriages, and to abide by same," etc.

Section 5. "That any parties who at any time previous to the passage of this act have lived together as man and wife and who *desire to contract a legal marriage* shall be entitled to the benefit of the provisions of this law, and the issue of such cohabitation shall be thereby legitimized upon the parties complying with the foregoing requirements," etc.

It is urged that these legislative enactments amount to a declaration that such a marriage as that of Pearce and Charlotte was null and void, and that they prescribed the formalities which were to be complied with to impart to it a legal existence, a now contested validity.

Here, the law sanctions the marriage, when the parties were willing, able to and did contract pursuant to the forms and solemnities which it prescribes. To those who had so contracted—whites or blacks, freemen or slaves, and by whatever name their marriage may be called, whether public, private or religious—the law of 1868 was entirely useless. It could neither add to or detract from an already existing validity.

It is objected that the marriage of Pearce and Charlotte was celebrated by one who had not been authorized by a license to celebrate it. Our Code does not declare null a marriage not preceded by a license—6 La R. 470—and, as to those who were our slaves, their own consent and that of their masters were alone sufficient to give to their marriage an undeniable validity, one which produced no effect as long as they were held in bondage, but which—from their emancipation—has secured for them and their posterity the rights and privileges bestowed by the State on a marriage authorized and sanctioned by its laws, on the birth of children legitimated by that marriage.

Nearly sixty years ago, this court said: "It is clear that slaves have no legal capacity to assent to any contract. With the consent of their masters, they may marry, and their moral power to agree to such a contract or connection as that of marriage, can not be doubted:

but, whilst in a state of slavery, it can not produce any civil effect, because slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom—although dormant during slavery—produces all the effects which result from such a contract among free persons.”

Girod vs. Lewis, 6. M. R. 560.

From the parties' admissions, Charlotte was legally married to Pearce, lived with him and as his wife until his death, had nine children whom he recognized as his, by whom he was recognized as a father, and—under no precept of either law or justice—can she now be considered as a concubine and her children as bastards: she is the widow and they are the heirs of Henry Pearce. That—as such—they are entitled to the amount allowed them by the administrator and the lower court, there can be no reasonable doubt.

From the judgment of the lower court Silbernagel & Co alone have appealed. Of the several grounds of opposition urged in their pleadings, only one is now insisted on, and that one we have decided.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

### No. 779.

#### THE STATE VS. WILSON JESSIE.

In criminal cases an objection to the ruling of the lower court must be put into the form of a bill of exceptions, and the bill must be filed. Article 488 of the Code of Practice, and the amendment thereof, do not apply to exceptions reserved in criminal prosecutions.

Where the information charges that the accused wounded another, with intent to commit murder, the jury may find that he was guilty of inflicting a wound less than mayhem, with intent to kill. The verdict is responsive to the charge.

A new trial will be refused unless it be shown that injustice has been done to the accused.

The amendment of an information which charges an “intent to commit murder,” to one which charges an “intent to kill and murder” does not make any substantial change in the information.

Where the verdicts returned by a jury are informal, the judge may properly so inform them, and remand them, with additional instructions, to bring in another verdict.

**A**PPPEAL from the Fourth Judicial District Court, parish of Ascension.  
*Duffel, J.*

*Fred. B. Earhart*, District Attorney, for the State.

*J. R. Winchester* for defendant.

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116 406

The opinion of the court was delivered by

DEBLANC, J. In the information as at first filed by the district attorney, he charged that—on the 20th of November 1876—defendant did feloniously, wilfully and of his malice aforethought, shoot and wound with intent to *commit murder*. He, afterwards, with leave of the Court, amended the information, and charged that defendant's intent was to *kill and murder*.

The prisoner's counsel objected to the amendment: his objection was overruled and he reserved a bill of exceptions which he did not file, under the impression—at least we so presume—that his reservation was sufficient and would stand in lieu of a bill. If we are not mistaken as to the impression under which he acted, the counsel was mistaken as to the purpose of the Statute of 1877, which amends the 488th article of the Code of Practice. That article, before and since the amendment, relates to exclusively the exceptions reserved on the trial of suits and not of criminal prosecutions. This is self-evident.

C. P. 488—Acts of 1877, p. 176.

The prisoner was tried and three successive verdicts returned against him, the two first in these words: "*Guilty, with intent to kill*"—and the third and last one in these: "*Guilty of inflicting a wound less than mayhem, with intent to kill.*"

Defendant applied for a new trial on the grounds:

1. That—after the trial had commenced—the information could not have been amended as to a matter of substance.
2. That, as amended, the information charged the commission of two distinct crimes in one count, and is bad for duplicity.
3. That the Judge erred in refusing to charge the Jury, as he was asked to do—that, unless it was proven beyond a doubt that the prisoner's intention was to murder, he should be acquitted—that malice is the essence of the crime charged and must be established, and that proof which—in case of the death of the wounded party—would have justified a conviction for manslaughter, could not justify any conviction under the information.
4. The first verdict rendered by the Jury should have been recorded, and the Judge could not legally have instructed them, after said verdict, that—if they so found—they could declare the prisoner guilty under sections 793, 794 and 972 of the Revised Statutes.
5. The third verdict—that which was recorded—is not responsive to the information.

## I

The amendment allowed by the Court was entirely useless: the original information charged that the prisoner shot and wounded with intent to commit murder, and—under that information—the prisoner

could have been found guilty of the lesser offense, that of inflicting a wound less than mayhem, with intent to kill. 28th A. 434; Revised Statutes.

"A motion for a new trial is based upon the supposition that injustice has been done to the prisoner, and unless such is shown to have been the case, the application is invariably denied." The record which we have under consideration does not disclose any error which could have caused injury to the prisoner.

State vs Brown, 16 A. 384; Waterman's Criminal Digest, p. 44, No. 4; Wharton's Crim. Law, Sect. 384; Chitty's Crim. Law 638; Bishop's Crim. Law, Sects 885, 887 and 888.

## II

There is no difference between the offence of shooting with intent to *commit murder*, and that charged in the amended information "of wilfully, feloniously and with malice aforethought, shooting with intent to *kill and murder*." When preceding the qualification "*murder*," the qualification "*kill*" is a mere surplusage. To murder, to kill and murder, to shoot with intent to murder or with intent to kill and murder constitute only two and not four distinct offences. It would be different, if, to a charge "*with intent to kill*," the State Attorney were to attempt to add "*and murder*." If allowed, such an amendment would amount to a new information, for an offense of a higher grade than that charged in the first.

## III

The Judge did not refuse to charge that malice is of the essence of the crime of murder and intent to murder, but charged—in substance—that, though not guilty of the greater, the prisoner might be guilty of a lesser offence, and that—if the jury so found—they were, not absolutely bound to acquit him, as contended by his counsel, but that they could return against him a verdict for any offence of the same class as that charged in the information, but of a lower grade than that, for the presumed commission of which he was informed against. This instruction was in strict accordance with the legislation and jurisprudence of our State.

Rev. Statutes, Sect 1053.

## IV

The first and second verdicts were informal, and the court properly informed the Jury of that fact. He, then, gave them additional instructions, without any objection on the prisoner's part: they, thereafter, retired to deliberate and brought in a verdict of "guilty of inflicting a wound less than mayhem; with intent to kill." In this there was no irregularity.



## V

The prisoner's counsel contends that the last verdict is not responsive to the information, and—to obtain its reversal—he relies on the decision rendered by this Court in the case of the State against Pratt, in which it was held: “that the charge of inflicting a wound less than mayhem,” is not “necessarily included in a charge of shooting with a dangerous weapon, with the intent to kill and murder.”

Entertaining, as we sincerely do, the most profound respect for the acknowledged ability and learning of those who then composed the Supreme Court of the State, we have attentively read and considered the decision referred to, and we are constrained, though not without hesitation, to differ in opinion with them. To inflict a wound less than mayhem, to do so with a shotgun and with intent to kill, is to do that which—if done with malice aforethought—would partly constitute the crime of murder. To thus shoot, wound and attempt to destroy life, is to perpetrate an offence which—it seems—belongs to but one class of crimes, that charged in the information. In both, the intent to kill must exist and be, in part, carried into execution: the only difference between those offences is that one is premeditated and the other not. They do not necessarily differ in the instrument used, and—in both—the assailant's purpose is to kill: without that purpose and without the infliction of a wound, neither can be committed. To shoot and wound with intent to murder, is to perpetrate a crime higher—by only one degree—to the offence of shooting and inflicting a wound less than mayhem, with intent to kill; the latter is ever included in the former and as inseparable from it as the assault from the battery.

“Under an indictment for a felony, the accused may be convicted of a misdemeanor, when both offences belong to the same generic class, and the information for the higher offence contains all the averments necessary to let in proof of the misdemeanor.”

Waterman's U. S. Crim. Digest, p. 639, Nos. 34 and 31; 28 A. 434; 6 A. 286; 14 A. 830; 13 A. 243; 12 A. 625.

“Generally speaking—says Wharton—where an accusation includes an offence of an inferior degree, the jury may discharge the defendant of the high crime and convict him of the less atrocious, and in such a case it is sufficient if they find a verdict of guilty of the inferior offence and take no notice of the higher.”

Wharton's Crim. Law, Sect. 384.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed.

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State ex rel. Agusti vs. Houston, Sheriff.

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No. 785.

## THE STATE EX REL. A. AGUSTI VS. J. D. HOUSTON, SHERIFF.

The jurisdiction of this court does not extend to cases of conviction under act No. 9 of the Legislature passed in 1874.

An appeal will not lie to this court from the decree of an inferior court in a matter of *habeas corpus*.

The interest which entitles a party to appeal must be a real, existing interest in the particular cause, and not a conjectural one, contingent on the happening of an uncertain future event.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

*Alex. Dalsheimer* for plaintiff and appellee.

*C. H. Luzenberg* for defendant and appellant.

*Thos. J. Semmes, amicus curiæ.*

The opinion of the court was delivered by

SPENCER, J. This is a proceeding by writ of *habeas corpus*, sued out by Agusti before the Fourth District Court of Orleans, against the Criminal Sheriff of said parish.

The facts are as follows: Relator, Agusti, was arrested and tried by Recorder Smith for violation of act 9 of 1874, relative to the selling of lottery tickets in New Orleans, and was sentenced to pay a fine of twenty-five dollars or be imprisoned for five days.

Agusti applied to the judge of the Fourth District Court for writ of *habeas corpus*, and was upon hearing thereof discharged from custody by said judge.

Thereupon Recorder Smith ordered the re-arrest and commitment of Agusti, under the said former conviction. At the same time the recorder applied to the Superior Criminal Court, reciting the facts, and alleging that J. D. Houston, Criminal Sheriff, would again release said Agusti, unless restrained, etc. Whereupon he prayed for a mandamus on said sheriff, to compel him to retain said Agusti in custody under said sentence. After hearing, this mandamus was made peremptory by said Superior Criminal Court, and the said sheriff was ordered to execute the sentence of the recorder upon Agusti, "any proceeding in any other court in the premises notwithstanding."

Agusti being thus recommitted, again applied to the Fourth District Court for writ of *habeas corpus*, which was granted. The sheriff declined to obey it, on the ground that he could not disobey the order of the Superior Criminal Court above referred to. The sheriff was thereupon committed for contempt by the Fourth District Court—but finally obeyed the writ and produced the body of Agusti—showing as authority for the detention, first, the commitment by Recorder Smith, and, second, the mandate of the Superior Criminal Court. Upon hear-

ing the parties the Fourth District Court again sustained the writ of *habeas corpus* and discharged the prisoner. From that decree the present appeal was taken by Houston, Criminal Sheriff; who alleges that he is aggrieved thereby, and that he has an interest in the result exceeding \$500—since by reason of said decree he has been forced to disobey the mandate of the Superior Criminal Court, whose executive officer he is, and thereby is liable to a fine of \$500 and suspension from his office, the emoluments of which are far beyond \$500, etc.

At the threshold we are met by the appellee's objections. First, that this court is without jurisdiction, and, second, that Houston has no such interest as entitles him to an appeal.

We think both objections well taken.

In the case of "The State ex rel. Geale vs. Recorder," reported in 30 An. 450, we held that our jurisdiction did not extend to cases of convictions under said act No. 9 of 1874. It is unnecessary to again state the grounds of that decision.

Besides, it is well settled that an appeal will not lie to this court from the decree of an inferior court in a matter of *habeas corpus*. In *ex-parte* Mitchell, 1 An. 413, this court said: "A judgment rendered on an application for a *habeas corpus* can in no sense be considered a final judgment. It does not decide all the matters in controversy between the State and the accused, but is in the nature of an interlocutory order, the tendency of which is not to work an irreparable injury to the prisoner. If the language of this article (63) had left the intention of its framers in doubt, that doubt would be removed by reference to the sixty-seventh article, which gives to this court and to each of its judges the power to issue writs of *habeas corpus* at the instance of all persons in actual custody under process, in all cases in which they may have appellate jurisdiction." "*This grant of original power precludes the idea of an appellate jurisdiction in relation to the same subject.*" "*Appeal dismissed.*"

This case was cited and reviewed with approval in "Cook et al. vs. Keeper of Parish Prison." 15 An. 347.

It is therefore manifest that we have no jurisdiction of the original *habeas corpus* case of "State ex rel. Agustí vs. Houston, Sheriff." But it is contended that as Houston may be fined and suspended from his office, and thereby injured to amount of more than \$500, an appeal will lie in his behalf. The answer to this proposition is that it will be time enough for him to appeal when the decree inflicting these severe penalties on him has been rendered. It would be difficult to conceive a case where an appeal would not lie, if a party may substitute for the amount actually in dispute conjectural and indirect losses which may upon future contingencies result to him. The interest which entitles a party

to appeal must be a real and personal interest in the particular cause, and not a merely conjectural one in some possible consequence of that cause. Sheriff Houston has no such interest in this suit. We are at a loss to conceive how it can be said that the matter or thing in dispute in this case is Sheriff Houston's office. His office is no more involved here than it is in every other case where he is called upon to perform official duties. The case cited of "*Simonds vs. Judge of Sixth District Court*," 24 An. 424, is not in point. That was a proceeding where the judgment creditor of an alleged partner had seized his debtor's interest in a partnership and took a rule against the other partners to show cause why a receiver should not be appointed and the whole property of the partnership taken from them and turned over to the receiver. From a judgment so decreeing it was held that an appeal would lie, although the judgment of the creditor was only \$175, but the value of the property sought to be taken was over \$1000.

The appeal in this cause is therefore dismissed at cost of appellant.

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No. 839.

THE STATE VS. THOMAS RYAN.

The continuance of a criminal case can not be asked on the ground of the absence of material witnesses, when it is not shown that due diligence was used to secure the attendance of the witnesses.

The widow is a competent witness to prove the dying declarations of her former husband.

Threats of the deceased against the one on trial for killing him, not shown to have been made in the presence of the accused, or communicated to him, are not admissible in evidence.

It is too late, in a motion for a new trial, to urge objections to the charge of the judge which were not reserved at the time the charge was given.

**A** PPEAL from the Fourth Judicial District Court, parish of Ascension.  
*Duffel, J.*

*Fred. B. Earhart*, District Attorney, for the State.

*James D. Augustin, John H. Ilsley, Jr., and John A. Cheevers* for defendant.

The opinion of the court was delivered by

SPENCER, J. Defendant was indicted, tried, and convicted, without capital punishment, on a charge of murder. He appeals; but his counsel have not favored us with an oral or written argument.

We find in the record the following bills of exception:

1st. To the refusal of the court to grant him a continuance on his affidavit of the absence of two material witnesses. The judge *a quo* refused the continuance on the ground that proper diligence had not

been shown to procure said witnesses, who were stated in the affidavit to be residents of the parish of Ascension. The affidavit alleges, in general terms, that due diligence had been used, but does not set forth in what it consisted. It does *not show even* that subpoenas *had been issued*, but only avers that on account of their absence "subpoenas can not be served upon them." *Non constat*, that had subpoenas been issued in time, they might have been served before they absented themselves. The district judge had better opportunity of knowing the diligence used than we, and much is trusted to his discretion in these matters. On the face of defendant's showing, and taking all his allegations for true, we can not say the judge improperly refused the continuance.

2d. The next bill is to the competency of the widow of the deceased to prove his dying declarations. We see no possible reasons for excluding her; because, even admitting that the wife is not a competent witness for the State, in a prosecution against one who has committed a criminal offense upon her husband (a proposition we are not prepared to assent to), still, after the husband's death, she is no longer his wife, and the rules of evidence, as between husbands and wives, are no longer applicable.

3d. The next bill is to the refusal of the judge to allow defendant's witness to testify to threats by the deceased against the accused, where it was shown those threats were not made in the presence of accused or otherwise communicated to him. The judge did not err. See 6 A. 554, 14 A. 570, 827, 5 A. 489, 22 A. 454, 10 A. 458. Dupré vs. State, 33 Ala. 380, also 22 Ala. 39.

4th. The judge delivered his charge in writing, to which no exception was taken. But the accused submitted certain written charges, and requested the court to give them to the jury. The judge declined to do so, on the grounds that so much of said special charges as were legal had been embraced in and were fully covered by the written charge he had already given. We have carefully compared the judge's charge with that requested, and we think this is true.

5th. Defendant filed a motion for new trial, based on the following grounds; first, that the verdict was contrary to the law and evidence. It is not for us to review the evidence in criminal matters, were the evidence in the record, as we have no jurisdiction of the facts, but only of law. Second, that the court erred in refusing the continuance referred to above, also in admitting the testimony of the widow, and in excluding evidence of threats, as detailed above by us, and also erred in certain charges given the jury and in refusing the charges asked. These matters have all, with one exception, been reviewed in noticing the various bills of exception, wherein all of them were properly pre-

sentable. They can not be presented by motion for new trial, but must be by bill of exception. This is especially true of objections to the judge's charge. It is too late, in a motion for new trial, to urge objections to the charge which were not reserved at the time the charge was given. See *State vs. Gunter*, 30 A. 536. The third ground for new trial is newly discovered evidence. The showing is not sufficient, either as to its materiality, competency, or discovery after trial, etc. The judge *a quo* properly refused the new trial.

The judgment and sentence appealed from is affirmed.

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No. 783.

DODD, BROWN & CO. VS. JOHN BISHOP & CO. ET AL.

A promissory note executed in the name of a certain commercial firm, in liquidation, by an agent of one of the former partners, after the dissolution of the firm, is not binding on the former members who have not given any specific authority for the execution of the note.

Where a creditor of a former commercial firm sues its individual members for goods sold to the firm, and declares in his petition on the itemized account of the goods, and also on a promissory note of the firm, given in liquidation of the account by one not authorized to sign for the firm, he will be entitled to recover for the goods, on the unopposed proof of their sale and delivery.

One who acts in such a manner as to induce others to believe that he is a member of a certain partnership, makes himself liable to them as a partner.

One who executes a promissory note in the name of another without authority to do so, becomes personally liable for the amount of the note.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*W. W. Farmer and Cobb & Gunby* for plaintiffs and appellees.

*Wells & Potts* for John Bishop.

*R. W. & R. Richardson* for Mrs. L. S. Berry.

*J. W. Wells, Jr.*, for J. M. Berry.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs allege that John Bishop, Mrs. L. S. Berry, and her husband, J. M. Berry, are solidarily indebted to them in sums of money amounting to \$1186 95, with ten per cent interest thereon, as stated in the petition. That the said John Bishop and Mrs. Berry were commercial partners, doing business under the name of John Bishop & Co., and that J. M. Berry, the husband, having permitted his wife to trade as a public merchant, was bound solidarily with her. Plaintiffs then set forth in detail how said indebtedness arose, and aver that it was for the price of goods, wares, and merchandise, by them sold and furnished to Bishop & Co. That, from time to time, Bishop & Co. executed

notes and drafts in acknowledgment of these debts, and in renewal and extension thereof. That on June 15, 1874, Bishop & Co. executed three notes (the amounts and maturities of which are set forth, and aggregate \$1186 95) in settlement and extension of their indebtedness, which notes are signed "John Bishop & Co., in liquidation." They aver the liability of said Bishop and Mrs. Berry on these notes thus given in the course of the liquidation of the partnership. They pray for judgment *in solido* against all said parties, and for general relief.

Subsequently, plaintiffs filed an amended petition alleging that Mrs. Berry was judicially separate in property from her husband, and that the debt inured to her separate advantage. That in the management of said partnership J. M. Berry acted as agent of his wife, but held himself out as a partner in said firm, and so declared in the notes sued upon, which were signed, "John Bishop & Co., in liquidation," by him, and which recited in their body that he was a member of said firm. They pray as before.

The defendants answered separately. Bishop generally denies plaintiffs' allegations, admits the partnership, and avers that the firm of Bishop & Co. was dissolved on            day of February, 1874, months before the notes were executed, and denies J. M. Berry's authority, as agent or otherwise, to sign notes with the firm name after its dissolution. Mrs. Berry makes a similar answer, and J. M. Berry alleges that he signed and acted as agent, and not for himself, and denies that he held himself out as a partner, and avers that his name as a partner was inserted by error in the body of said obligations by plaintiffs' agent.

There was judgment for plaintiffs against all the defendants *in solido*, and the latter have separately appealed.

So far as Bishop and Mrs. Berry are concerned, there is not the least doubt of the correctness of this judgment. Plaintiffs very properly allege upon the original debt created by the sale and delivery of the goods, as well as upon the notes executed by J. M. Berry, in the name of "John Bishop & Co., in liquidation," in acknowledgment thereof. They have fully and indisputably established their claim by evidence outside of and beyond that of the notes, producing full and complete proof of all the items of account, with the letters of Bishop & Co., and bills of lading, receipts, etc. In fact, Bishop's counsel, in his pointed and able argument before us, makes this admission: that the "*testimony of the plaintiffs does show that Bishop & Co. owed an amount to the plaintiffs equal to the notes, a fact which Bishop has never denied.*" Now, when it is remembered that all this testimony was admitted without any objection whatever, we are at a loss to conceive how, under the pleadings, we can be expected to do otherwise than affirm the judgment. Had the plaintiffs declared specifically and exclusively on the notes (which they did

not), we would, under the long-settled jurisprudence of this State, be bound to give effect to this proof if admitted without objection.

We are free to say that if the only proof of plaintiffs' claim consisted of the notes signed "John Bishop & Co., in liquidation," executed and signed by J. M. Berry, whether as agent of his wife or partner, we should hold it insufficient to bind Bishop or Mrs. Berry. These notes carry on their face evidence of the fact of the previous dissolution of the firm, and in such case it is well settled that after dissolution one of the partners can not without special authority (and much less an agent of one of them) "renew a partnership debt, impose new obligations on it, or vary the form or character of those already existing." See Kent, vol. 3, sec. 43, p. 69, seventh edition; Story on Partnership, sec. 322; 5 Rob. 172; 6 Rob. 70; 7 A. 356; 13 A. 479; 29 A. 586. But, as we have seen, plaintiffs have fully sustained their demands by evidence *dehors* these notes, and the proof shows no novation was effected or intended. This disposes of the case as to Bishop and Mrs. Berry. It only remains to examine the case as to J. M. Berry.

It seems to be conceded that Berry was not in reality a partner in the firm of John Bishop & Co. The articles of partnership and its dissolution show that it was Bishop and Mrs. Berry who composed that firm; that Berry acted therein as representative of his wife, and as her *alter ego*. But plaintiffs without objection amended and charged that whether Berry was partner or not he, by his declarations, conduct, and acts, had held himself out as such, and induced them to so believe, and was, as to them, liable as partner.

Berry swears positively and emphatically that he never did represent himself as a partner, and that the insertion in the body of said notes of his name as a partner was done by plaintiffs' agent, and said notes were signed by him in error, and without noticing the recital of his name therein. This is, perhaps, true; yet the fact of plaintiffs so inserting his name shows, also, that they believed him to be a partner (and Dodd, plaintiff, swears that his recollection is that Berry so stated). Did his acts and conduct (aside from his declarations) justify such belief? It is shown that Berry was the active manager of the partnership; that it was he who visited St. Louis and bought the goods from the plaintiffs; that he repeatedly signed notes with the name "John Bishop & Co.," without adding any words indicative of his doing so as agent. He admits that he never told the plaintiffs that *he was not a partner*. All his letters and correspondence with plaintiffs were signed "John Bishop & Co.," and nowhere in his transactions with plaintiffs is there to be found, by word, deed, or writing, any thing from Berry indicating that his acts were those of an agent.

Besides, as we have seen, he had no authority after the dissolu-



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Dodd, Brown & Co. vs. Bishop & Co.

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tion of the firm to sign the notes sued upon; and although he did not thereby bind others, he bound himself: especially as he did not profess to act as agent, and did not indicate that he was not acting as a principal. This conduct on his part induced plaintiffs to postpone demanding their claims from John Bishop & Co. for several months, and induced delays that may have been prejudicial to their interests. The district judge held Berry liable, and we are not prepared to say that he erred.

The plaintiffs remitted in the court below two per cent of the interest allowed by the judgment below; and have prayed in this court for damages for frivolous appeal. We do not think this a proper case to inflict them.

The judgment appealed from is affirmed at the costs of appellants.

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ON APPLICATION FOR REHEARING.

MANNING, C. J. One of the grounds for the rehearing prayed by the defendants is the allowance of eight per cent interest. The rehearing is granted.

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ON REHEARING.

The interest allowed by the lower court should be reduced to five per centum per annum. It is therefore ordered and decreed that the judgment of the lower court be amended by reducing the rate of interest allowed to five per centum, and as thus amended, that it be affirmed, and that the appellees pay the costs of appeal.

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No. 869.

JAMES A. CAWTHORN ET AL. VS. J. D. CAWTHORN, ADMINISTRATOR.

The parish courts have exclusive original jurisdiction of suits brought against the administrator of a former tutor, by the former wards of the latter, for a settlement of the tutorship.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
Boarman, J.

*Nutt & Leonard* and *W. H. Wise* for plaintiffs and appellees.

*N. C. Blanchard* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs, representing themselves as heirs of Ashley T. Cawthorn, brought this suit to recover of J. D. Cawthorn, administrator of the succession of W. M. D. Cawthorn, the sum of \$8337 37 in gold, with legal interest from January 1st, 1867, for this, viz.: "The value of the property which belonged to the succession of A. T. Cawthorn, deceased, sold and converted to his own use by said W. M. D. Cawthorn,

Cawthorn vs. Cawthorn.

deceased, for notes collected by him due said succession of A. T. Cawthorn, and for rents of lands belonging to said succession, which came into possession of said W. M. D. Cawthorn *as tutor for your petitioners*, and as administrator of the succession of A. T. Cawthorn, deceased, and for which he has never accounted," as per detailed statement annexed to the petition. In this statement figures amount of inventory of 1865, which is put down at \$2730.

The answer is a general denial of indebtedness, with a special averment that W. M. D. Cawthorn had paid out for the estate more money than he has received, as shown by the inventory. The items of credit are given in detail, vouchers filed, and defendant reconvenes and prays for judgment.

There was judgment in favor of plaintiffs, and the defendant appeals. A. S. B. Prior, alleging that he is the surety of W. M. D. Cawthorn as tutor of plaintiffs, and injured by the judgment, also appeals.

The appellant Prior urges that this whole proceeding is void for want of jurisdiction in the district court; and in this we think he is right.

This is, and can be, nothing else than an action by the plaintiffs against the administrator of their deceased tutor for a liquidation and settlement of the affairs of the tutorship. The district court has no jurisdiction of such suit. Constitution, arts. 87, 88. "*Sarah L. Lacy vs. Succession of O'Neil*," 25 A. 608. "*Gibbs vs. Lum*," 29 A. 526.

It is therefore ordered and decreed that the judgment appealed from be annulled; and plaintiffs' suit is dismissed as in case of nonsuit, appellees paying costs of both courts.

## No. 774.

## THE STATE EX REL. DANIEL WILSON VS. E. T. PARKER.

When an act of the Legislature, creating an office, takes effect from its passage, the term of the office will commence to run from the passage of the act, in the absence of any provision in the act to the contrary.

One who is appointed to the office of Public Administrator at any time during an unexpired term of that office, is entitled to hold it, in virtue of that appointment, only to the end of that unexpired term.

**A**PPPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*  
*Thomas J. Semmes, Robert Mott, and F. P. Stubbs* for relator and appellant.

*Randell Hunt, W. W. King, John T. Ludeling, and Boatner & Richardson* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Relator claims from defendant the possession of the

office of Public Administrator of the parish of Orleans, by virtue of a commission thereto, issued by Governor Nicholls, on the 3d May, 1878.

Parker claims to hold, under a commission from Governor Kellogg, of date June 10th, 1875, and contends that his tenure does not terminate until 10th June, 1879.

The act creating the office of Public Administrator was approved March 5th, 1870, and provides that the Governor shall appoint a suitable person as such, etc.

Section 6. "That the Public Administrator shall hold his office for the term of four years, and until his successor be appointed and duly qualified."

Section 10 provides, "That this act shall take effect from and after its passage."

The first appointment was of one Foulke, on the 2d April, 1870. Foulke resigned, and E. T. Parker was appointed, 14th June, 1872, "*vice Foulke, resigned.*" On 10th June, 1875, Parker was again appointed, as stated above, and claims that he is entitled to hold for four years from that date, or until 10th June, 1879.

The decision of this cause depends upon the question, When did the term of four years, for which Parker was last commissioned, begin? The defendant contends that it began on the day of his re-appointment, to wit : 10th June, 1875.

Relator contends that it began either on the 5th March, 1874, (being four years after the passage of the act), or on the 2d April, 1874, (four years after the first appointment under the act), and had therefore expired on the 3d May, 1878, the date of relator's commission.

The object of the statute was most assuredly *the creation of a public office*. It can not be denied that on and after the 5th March, 1870, there existed in the parish of Orleans, as well as in the other parishes of the State, the "office of Public Administrator." It is equally certain that the Legislature intended to and did fix *a term* for that office, and that *that term* was four years. The "office" commenced its existence on the 5th March, 1870, and in the absence of provision to the contrary, as an incident thereof, "*the term*" commenced *at the same time* that the office did. There is no more reason for saying that *the commencement of the term was suspended* until there was an appointee, than there is for saying that *the existence, the commencement of the office itself*, was suspended. Neither the existence of the office, nor the running of the term, depended upon the appointment of an occupant, so far as we can gather from the terms of the act. We are of opinion that, in the absence of provision to the contrary, the term begins with the existence of the office—and not with the appointment of an incumbent—otherwise infinite confusion would be introduced in the tenure of public offices. As said by this

Court, in "Bry vs. Woodruff," 13 La. 563, "in offices for terms of years, it is important they should have a fixed date of commencement and termination"—and we think, that where there is nothing in the act creating the office and its term directing otherwise, we should hold in the interest of public order that the term begins with the going into effect of the act creating the office.

But the defendant's counsel urge with much earnestness that the act does provide otherwise, because it declares "that the Public Administrator shall hold his office for the term of four years, and until his successor is qualified, etc." We regard this clause as simply fixing *the term* of the office; and upon examination it will be found that those are the almost invariable words used in the Constitution and Laws of this State for fixing *the terms* of office. Thus it is said of the Governor, "*He shall hold his office for the term of four years.*" *The same is said* of the Secretary of State, the Auditor, the Treasurer, the Attorney General, the Judges, the Sheriffs, and Clerks. Does any body suppose that these provisions entitle one of these officers, who may be appointed in the middle of a term, to hold for a full term? When the law says that "the Public Administrator shall hold his office for the term of four years" it means precisely what it does when it uses *the same words* with reference to other officers. It means to fix the "term" of the office, *i. e.*, the longest time it may be occupied without re-appointment; but does by no means imply that every incumbent shall hold it for four years, regardless of the time at which that term began, and of the time he was appointed. The effect of defendant's argument is to make *the term* of this office depend upon the mere agreement and consent of the executive and incumbent, instead of making it dependent upon the law. Its duration is at the caprice of these functionaries. Thus, they say that Foulke was appointed 2d April, 1870, and *his term* expired with his resignation in June, 1872. That Parker's *first term* commenced on the 14th June, 1872, the date of his appointment, and expired 14th June, 1875, the date of his present commission, and the date at which he and the Executive tacitly agreed that the term should end. This is to completely confound *the term* of that office with Parker's *tenure* of it. The latter is within the control of the parties, and may be longer or shorter, according to circumstances; but the former is not. The term remains invariable, *always the same*, and is not subject, in its duration, to the wishes or agreements of any persons whomsoever; while the *tenure* of an incumbent may always be terminated by his resignation and its acceptance. During one term there may be several *tenures*, but there can not be several terms in one *tenure*.

There is no sort of analogy between this case and that of "Kelly vs. Gilly," 5 A. 534. To make the cases parallel, the act creating this

office should authorize the Governor "to appoint as many public administrators as he deems necessary;" just as the law provides relative to notaries. Then we could say of public administrators what the Court does in that case of notaries: "The law does not require the Governor *to fill vacancies as to the office of notary public*, but to appoint the notaries that may be necessary. \* \* \* The notary appointed *"does not fill the unexpired term of his predecessor*, but is appointed a notary under the law, and is entitled to hold the office for four years from the date of his appointment." And why? Because each notary, in the opinion of that Court, is appointed to a different, independent office, never before held or occupied by any predecessor—that notaries had no predecessors in the proper and legal sense of that term; since it is not necessary that one should go out of office before another comes in—the Governor having authority to appoint *ad libitum*. Their possession of the records of notaries who may have died or resigned, or whose terms may have expired, was not by virtue of successorship, but by virtue (as said in "Kelly vs. Gilly") of the direction of the Governor, whose duty as chief executive is "to take care of and preserve the public property and records, where the laws have not otherwise provided." The whole decision in Kelly vs. Gilly rests upon this fundamental proposition, *that there are as many offices as there are notaries*, and that *there is no succession among them*. Can such a proposition be predicated of public administrators? It is absurd to contend that it can, for there can be but one public administrator at one time. There is but *one* office, and each incumbent is successor of the one who preceded him.

We hold, therefore, that the first term of the office of public administrator expired on the 5th March, 1874, and that the second term thereof expired on the 5th March, 1878. That Parker's first appointment on 14th June, 1872, was for the vacancy created by Foulke's resignation, and was not made to fill what is sometimes called "an original vacancy," *i. e.*, one caused by expiration of the term. That his second appointment on June 10th, 1875, was for the residue of the unexpired term commencing 5th March, 1874, and ending 5th March, 1878. That his tenure from 5th March, 1874, to 10th June, 1875, was by virtue of that provision, common to this statute and the general law, authorizing him to hold over until his successor was appointed. That this time, during which *he held over*, constituted legally no part of the *first term* of said office, and that the fact that no appointment was made on 5th March, 1874, did not continue the first term of the office beyond that day. These views render it unnecessary to discuss the authorities cited from 9 Wheaton, 734, and the opinions of Attorney Generals Taney, Berrien, and Mason, relative to the effect of the acceptance, by an incumbent, of a new commission before the expiration of his old one; since we hold that Parker's

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 State ex rel. Wilson vs. Parker.
 

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first commission had expired before the second one was issued to him. The judgment appealed from is erroneous, and must be reversed.

It is therefore ordered, adjudged, and decreed that the judgment of the court *a qua* be annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the relator, Daniel Wilson, be and he is hereby decreed to be the lawful Public Administrator of the parish of Orleans, and as such entitled to hold and exercise the same; and it is further decreed that E. T. Parker unlawfully holds said office, and he (said Parker) is hereby ordered to deliver and turn over to said Wilson said office, together with its books, papers, and archives, and to pay costs of this suit in both courts.

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 No. 771.

W. P. WEIGHT ET AL. VS. LIVERPOOL, LONDON & GLOBE INSURANCE COMPANY.

A foreign corporation, represented by a general agent, and local Board of Directors residing in the city of New Orleans, can not be brought into court by a citation served on a local agent domiciled in one of the country towns of Louisiana, who is only authorized to receive applications for insurance, and give binding receipts for the same, and who has not exercised, or represented that he possessed, any other authority.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*Cobb & Gunby* for plaintiffs and appellees.

*W. W. Farmer* and *Frank P. Stubbs* for defendants and appellants.

The opinion of the court was delivered by

EGAN, J. The plaintiffs sue upon a contract of insurance effected through one Behen, acting as agent for that purpose at the town of Monroe, in Ouachita parish. The allegation and proof are that the defendant is a foreign corporation having no domicile in the State, but having a general agency and board of directors in the city of New Orleans for the conduct of business of the company in Louisiana. This suit was instituted in the parish of Ouachita by means of citation addressed to and served upon J. E. Behen as agent of the defendant company. He excepted that he had no authority to stand in judgment or represent the absent defendant; and further, that said defendant had a New-Orleans department under the management of Andrew Foster Elliott of said city as general agent and a board of directors, also residing in said city, of which one Urquhart was chairman, and that suit should have been brought there. He also denied his authority to accept or pay losses, and averred that his authority was confined to soliciting insurance, receiving and forwarding applications, collecting and

receipting for premiums, and issuing what are termed binding receipts to hold good for a limited time, subject to the approval of the New-Orleans department or agency, and to the terms and conditions of the policies of the company, wherefore the court was without jurisdiction. It was admitted on the trial below that Behen had a printed sign stuck up in front of his place of business as agent for the defendant and other insurance companies. It is however shown that the only authority or power conferred upon him was derived from a letter or commission dated New Orleans twenty-fifth of May, 1876, addressed to him at Monroe, La., as follows :

“Dear Sir—By this present you are duly authorized to receive applications for insurance for this company and to issue the usual binding receipt for same until approval by this office.

“Your obedient servant,

“(Signed)

ANDREW FOSTER ELLIOTT,  
Recording Secretary.”

Elliott testified in response to interrogatories of plaintiffs that the foregoing was Behen's commission as agent of the company; that no additional commission had been since issued, and that Behen had no other power *than as therein set forth*; and no authority to appear in court in any judicial proceedings; that all proofs of loss and applications for the payment of losses in this department are made to the resident secretary and by him submitted to the board, and when approved are paid by the secretary in New Orleans; that the company has a New-Orleans department and general agent for Louisiana, to wit, himself; that he resides in New Orleans; and is also resident secretary of the company, which is a foreign one, domiciled in England, and from which all the rights and powers of the Louisiana agency are derived, and that the American branch of said company has separate capital under the control of trustees for American policy holders to the extent of over three millions of dollars. He further swears that Behen is furnished with printed forms of application and receipt, and has no authority to change or erase from them in any way.

It does not appear that Behen ever acted or professed either to the plaintiffs or any one else to have authority in excess of the powers conferred by the before-recited commission, and we do not consider it material for the present inquiry whether he was agent of the company or simply of the New-Orleans department; his powers were the same in either case. The receipt sued on simply certifies that the insured had effected insurance against loss or damage by fire subject to the conditions of the company's policies on the property described therein, and that the certificate is binding for thirty days, unless a policy is sooner delivered or notice is given that the risk is declined. And so far from

indicating that Behen, who signed it, had power to issue policies, as is usual with general agents, or that he had the powers usually incident to such agencies, the fact of the issuance of the binding receipt (as it is termed) in such form instead of a policy, indicated very clearly that he had no such general powers, but only the limited ones stated in the letter of commission, and that his action was subject to the approval of the New-Orleans department or some other authority not present from whom the policy should emanate, and that the insured must have been and was affected with notice of those facts at the time the receipt was issued. We think the evidence sustains the exception that Behen had no authority to represent the defendant company in any suit or judicial proceeding, either when this suit was brought or at any other time, and that the district court of Ouachita was without jurisdiction of the defendant company, which if suable otherwise than by attachment, or where it had property by the appointment of an attorney *ad hoc*, would seem from the present record to have been so suable only through its agency in the city of New Orleans.

The case of Michael vs. Mutual Insurance Company of Nashville, 10 An. 737, relied upon by the judge *a quo* and plaintiffs' counsel, has no application to the facts of the present case. There the exception admitted that the person upon whom citation was served had been agent of the absent company, but averred that he was so no longer. It did not appear that the company had any other agents in Louisiana than Johnson, who had issued the policy, and the court held that a foreign insurance company doing business through an agent in New Orleans, and taking risks in Louisiana, can not be permitted to frustrate a claim in a Louisiana court upon a contract made with it by *revoking the power of the agent* on the eve of the institution of suit for a loss of which it has been notified, a doctrine which is perfectly correct, as was the decision under the facts of that case. Here, however, there is no question of the revocation of a power once existing, but a denial of power at any time in Behen, who alone was cited to represent or stand in judgment for the absent defendant company. The case of Quinn vs. Manhattan Life Insurance Company of New York, 28 An. 135, also cited by the plaintiffs' counsel, is equally inapplicable. There was no question of jurisdiction or of authority to defend suit or stand in judgment in the case. On the contrary, although the defendant company had withdrawn its Louisiana agency, and so advertised, and also notified the plaintiff more than a year before the institution of suit, the trial was purely on the merits, and the defendant company appeared by counsel and obtained judgment rejecting the plaintiff's demand; and in that case the court said there was no law requiring foreign insurance companies taking policies within this State to keep an agency within its borders. We



think the law is correctly stated by Wood on Fire Insurance in the passage quoted in the brief of plaintiffs' counsel, "that the same rules apply to insurance companies as apply in case of individuals, and a person who is clothed with power to act for them at all is treated as clothed with authority to bind them as to all matters *within the scope of his real or apparent* authority, and that third persons are not bound to make inquiry beyond their apparent powers." Sec. 383, p. 624. This, however, must be taken in connection with and subordination to the positive provisions of our own law, which require that the power to defend a suit shall be express and special. C. C. 2997-98. Indeed, the principle referred to relates rather to the power to bind the corporation by the acts or contracts of the agent than to the special matter of representing it in judicial proceedings. And in the present case no act or fact shown can be interpreted into the representation, appearance, or exercise of any other or greater powers in Behen than those conferred by the written commission already quoted, or than as shown by the evidence of Elliott and other witnesses.

In *Fuselier, Administrator, vs. Robin*, 4 An., the doctrine of the Louisiana law in accordance with our Code was announced to be that the power to represent a principal in the defense of actions is not one of administration. Such a power can result only from the *express terms* of an instrument, or from an implication so clear as to be irresistible. And the absent defendant with foreign domicile had one agent in Pointe Coupée who had authority to institute and prosecute suits, and another in New Orleans with power to defend also, and the court held that he could only be sued at the domicile of the New-Orleans agent. This case is referred to and the doctrine re-affirmed in *Dickson vs. Morgan*, 6 An. 562. In *De Lizardi et als. vs. Pouverin et als.*, 4 R., the court said that where the power was a limited one (as in the present case) it can not be extended beyond what is expressed therein. In *Rowland vs. Pascal's Executors*, 10 La., 598, it was held that when there is nothing to show the character of the mandate with which an attorney is clothed it *will not be presumed that he had authority to receive service of citation*. In *Sloan vs. Menard*, 5 An. 218, a general authority and public notice to all persons that the agent was authorized to attend to the business of the principal in his absence was held not to authorize the agent to bring the principal into court as a defendant, and judgments so obtained against him were annulled. In *Dawson vs. Landreaux*, 29 An. 363, it was held that even the admission of an alleged agent that he was authorized to represent a third person in a suit does not prove the agency, and that the authority to represent an absent defendant in a suit must be shown expressly or from implication so clear as to be irresistible.

It is, however, needless to multiply authority on a point so well set-

tled in Louisiana. We think it probable from the evidence that the absent corporation might have been suable in New Orleans ; it certainly was not in Ouachita, under the evidence in this record, otherwise than by an attachment, or, at all events, by the appointment of a curator or attorney *ad hoc* in case property was found in the parish, which fact does not appear in the present case. Fortunately, henceforward all difficulty on this subject will be removed by the act of 1877 requiring foreign corporations doing business in this State to establish and make public a domicile and agency therein for the purposes of suit.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be and it is avoided and reversed, and it is now ordered that the exception to the capacity of J. E. Behen to defend this suit and stand in judgment, and to the jurisdiction of the district court of Ouachita be maintained, and that plaintiffs' suit be dismissed at their cost in both courts.

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No. 787.

M. L. KELLY vs. G. M. SANDIDGE ET AL.

The hypothecatory action can not be maintained unless the evidence shows that amicable demand on the debtor for the payment of the hypothecary debt was made in a formal manner, thirty days previous to bringing the suit.

The creditor who brings the hypothecary action must declare on oath that the debt is really due him, and that he has demanded payment of his debtor thirty days previous to bringing the suit.

Where a settlement is made after the termination of a tutorship, by which the former ward accepts the former tutor's individual obligation, payable at a distant day, in lieu of the security of his bond, and the legal mortgage resulting from its record, the former ward loses all recourse on the property of the tutor which has passed into the *bona fide* ownership of a third person.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Parsons, J.*

*Bussy & Morgan* for plaintiff and appellee.

*Newton & Hally* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. Mark Gouder was appointed tutor to the plaintiff in 1859, and gave bond for six thousand dollars, which was recorded. At that time he owned a tract of land in Morehouse of two hundred and twelve acres, which through several mesne conveyances has become the property of the defendants. This suit is to enforce her mortgage upon it.

The tutorship was terminated by the marriage of the plaintiff in 1866. She and her husband took a rule in 1869 upon Gouder to file an account of the tutorship. He filed a partial account, and asked for further time to complete it. In January 1871 they had a settlement. The

indebtedness of the former tutor was fixed in round numbers at two thousand dollars, and they agreed to separate it into six equal instalments, the first of which he paid cash, and for the others, gave his five notes maturing from one to five years after the settlement. This suit was instituted in 1875, and service was made in September and October of that year on the two defendants. Gouder has not been sued at any time on these notes.

The action is hypothecary, and is based upon the mortgage resulting from recording the tutor's bond in 1859, and from recording a statement of the tutor's indebtedness prior to 1870, under the Constitution of 1868 and the act of the general Assembly thereunder.

The defendants except on several grounds, of which only these need be noticed, 1. That the thirty days demand has not been made of the debtor prior to the institution of this action; 2, that affidavit of the existence of the debt was not made by the plaintiff; 3, that the alleged claim of the plaintiff has not been judicially ascertained, and determined contradictorily with her debtor. In their answer, they plead in defence, that the plaintiff has made a voluntary and extra-judicial settlement with her tutor, which releases his bond, and the mortgage created by the tutorship.

It is a condition precedent to the institution of the hypothecary action, that amicable demand shall have been made of the debtor for the payment of the hypothecary debt thirty days previous to bringing the suit. Code of Practice, art. 69. The demand, contemplated and provided for by this article has not been made. The only demand of which there is any proof is the ten days demand made of the third possessor, and we have no means of knowing that even that was made prior to the filing of the suit, since this Record presents the singular feature of not exhibiting the filing, or the date of filing, of any paper copied in it. The ten days notice is dated Aug. 24, 1875, was received by the sheriff on the 27th., and served on 28th. of same month. When the suit was filed does not appear. For aught that the Record shews, it may have been filed before the notice was issued or served. The citation upon the petition was served on one defendant Sept. 20, and on the other Oct. 9. But assuming that the suit was not filed until after the expiration of ten days from Aug. 28th., the date of service of that notice, there is still wanting any evidence of the demand upon the debtor thirty days before.

The testimony of Gouder, who now lives in Texas, was taken under commission, and he was asked if demand of payment of the notes had not been made of him. He answered that demand of the payment of each note, as it matured, had been made of him by the plaintiff's counsel by letter. This is not the demand contemplated by the Code of Practice as the necessary precursor to the institution of the hypothecary

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Kelly vs. Sandidge.

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action against a third possessor of property, but the demand ordinarily made of a maker of a note prior to the institution of a suit against him personally for the recovery of the amount of the note. The formal demand, as set forth in the article above cited must be made, or the action fails. *Broussard v. Phillips*, 6 New Series, 310. *Robichaud v. Worsham*, 4 La. 125.

It is also prescribed that the creditor who brings the hypothecary action must declare on oath that the debt is really due him, and that he has demanded payment of his debtor thirty days previous to bringing the suit. Code of Practice, art. 70. But it has been held that where the creditor proceeds *via ordinaria*, such oath is not necessary. *Smith v. Blunt*, 2 La. 132. *Gravier v. Baron*, 4 La. 239.

There was no judicial ascertainment of the sum due by the tutor to his ward. *Gibbs v. Lum*, 29 Annual, 531. Long after she had become *sui juris*, she made an extra-judicial settlement with her tutor of his tutorship, and by concert with him established a fixed sum as the amount due her, and voluntarily entered into an arrangement with him, whereby the sum due was divided in several instalments, the first of which was paid cash, and the last was not to be paid until five years thereafter. Even if such voluntary and extra-judicial settlement of a tutor's accounts be sufficient to base an hypothecary action against property alienated by him, and in the ownership of a third possessor, a question not necessary now to be decided, we think such settlement, made as in this case with postponement of the time of payment to a distant day, and by the acceptance of the tutor's individual obligations in lieu of the security of his bond, and the legal mortgage resulting from recording it, destroyed the right of the former ward to have recourse upon the property of the tutor which had passed into the possession and *bona fide* ownership of third persons.

The plaintiff took the settlement of her tutorship out of the hands of the law, and made one for herself, by the terms of which she must abide. To permit her to adjust her accounts with her former tutor, as her inclination or his suggestion prompted, and after that arrangement had become unproductive of benefit to her, to pursue the third possessors of his property through the hypothecary action, would be introducing a new and additional harsh feature in that proceeding, and would open the door to collusive settlements which might work incalculable injury. The judgment of the lower court is erroneous.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favour of the defendants against the plaintiff upon her demand, and for her costs in the lower court, and the costs of appeal.

Renearing refused

No. 863.

J. C. WILLIAMS vs. WM. HEFFNER, SHERIFF, ET AL.

80	1193
105	140
105	142

An alleged sale of his property by a debtor can have no effect as against a creditor who has attached the property, when the purchaser of the property fails to show that the act of sale was filed or recorded before attachment was levied.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
Boarman, J.

Nutt & Leonard for plaintiff and appellee.

Wm. H. Wise for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. Hamilton & Co. being creditors of one J. C. Grigg for a large amount sued out an attachment against his property, under which writ the sheriff seized and took possession of the land in controversy in this case. The seizure under the attachment was made about four or five p. m. on January 9, 1874. But on the morning of January 9, 1874, Grigg and his half-brother, J. C. Williams, plaintiff herein, had gone before the recorder and passed an act whereby said Grigg purported to sell to his brother, J. C. Williams, the land in controversy for \$7000; of which \$1000 is stated to be cash; \$2000 assumpsit of a mortgage to one Moore; and for the balance, \$4000, the purchaser executes his note at twelve months. There is nothing to show the date of the filing or registering of this deed beyond the certificate of the recorder, given on November 15, 1877, that the act is "now on file and record" in his office.

Hamilton & Co. proceeded in their attachment suit to judgment against Grigg, obtained recognition of their attachment privilege, issued execution thereon, and seized and advertised the property attached for sale. Williams, alleging his inability to give bond for injunction, filed this third opposition to the sale, citing the sheriff and Hamilton & Co. as defendants. The sale proceeded, and Hamilton & Co. bought the property. They answer the opposition of Williams by alleging:

1. That they seized and attached the property before the said pretended sale could have effect, and have bought the property under said attachment proceeding.

2. That the sale from Grigg to the plaintiff was a fraudulent simulation.

Both defenses are good.

1. The plaintiff has failed to show that his deed was filed or recorded as the law directs before Hamilton & Co. attached.

2. Williams and Grigg are brothers. Grigg is shown to have been greatly embarrassed and insolvent. He stated to one of the witnesses a few days before this pretended sale that he wanted to dispose of his property, "to beat old Hamilton, if he could." Williams is shown to

have been impecunious, without credit, industry, or enterprise; living most of the time with his mother. The \$1000 cash payment, as usual in such cases, turns out to be a pretended stale indebtedness, due years before by Grigg to plaintiff and another brother for loaned money and an indefinite amount of cotton. The only evidence that this claim ever existed is Grigg, and he represents it as being, so far as the \$500 borrowed is concerned, money borrowed by his aged and almost indigent mother for his said two brothers, who loaned it to him. One of the brothers, E. D. Williams, was sworn as to the reality of the sale from Grigg to J. C. Williams, but he knows nothing except what they had told him. He is silent as to this pretended loan. Plaintiff prudently does not testify, nor does the mother.

In our opinion the whole transaction between J. C. Williams and Grigg is an audacious and fraudulent simulation, so transparent as to be almost ludicrous.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered that there be judgment rejecting the demands of J. C. Williams at his costs in both courts.

Mr. Justice EGAN recused.

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No. 818.

## THE STATE VS. E. H. DOANE ET AL.

The sureties on the appearance bond of one committed on a felonious charge are entitled to be released from their bond, after the discharge of the grand jury at the first term of court after the execution of the bond, without finding a true bill.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*W. N. Potts*, District Attorney, for the State and appellant.

*Wells & Williams* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. E. H. Doane was charged with being an accessory before the fact to the murder of Isaac Myrick, and after a preliminary examination, was held in a bond of five thousand dollars by the committing magistrate to answer the charge before the District Court. He gave the bond with two sureties. That court afterwards met at the regular time for its next ensuing term, and a grand jury was empanelled, which failed to find a bill against Doane. After the discharge of the grand jury, Doane's sureties moved to be released from their bond.

The State opposed their discharge for the reason that although the

grand jury had not found a true bill against Doane at that term, *non constat* that a subsequent grand jury would not find such a bill at some subsequent term, and the crime being imprescriptible, Doane was liable always to an indictment. The State also contended that the sureties must be held bound until the grand jury had acted on the charge, and returned, "not a true bill."

If the sureties to a bond of this kind must be held bound until a second term of the court is held, and a second grand jury has been empanelled and discharged, they may be held until any subsequent term of court, or forever. They were entitled to a discharge from the appearance bond after the discharge of the grand jury at the first term after the execution of the bond, without finding a true bill.

The failure of the grand jury to indict the accused does not of itself relieve him of liability to a future prosecution. That can only be done by the jury acting on the charge, and returning, "not a true bill." But that is not the question here, but solely, whether the sureties to his appearance bond should be released by a judgment of court under the facts shewn. We think they were properly released from their bond.

Judgment affirmed.

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No. 871.

HELENA SNIDER ET AL. VS. LEONARD CUTLIFF ET AL.

Until the rendition of an account, and classification of the debts of the succession, the executor can not, even under an order of court, transfer to one creditor, in compensation or payment of his debt, an asset of the succession. Such a transfer is null and void.

Where the vendee of succession property sold on a twelve-months bond fails to pay the price, the executor may resolve the sale, and recover the property.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. *Boarman, J.*

*W. A. Seay and N. C. Blanchard* for plaintiffs and appellants.

*Land & Taylor, W. H. Wise, and Nutt & Leonard* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. The property of the succession of Mildred S. Cutliff, on application of her husband, R. A. Cutliff, as executor, was sold to pay debt, on twelve-months credit, the purchasers executing twelve-months bonds.

Among other property sold was the "Southern Hotel," in Shreveport, adjudicated to A. H. Leonard for \$13,600, for which he gave a

twelve-months bond with F. A. Leonard as security. The deed to Leonard was recorded in Conveyance Book, February 26, 1874, but there was no registry in Mortgage Book until twenty-second January, 1875. Prior to this registry in Mortgage Book, to wit, on December 30, 1874, Snider & Holmes, plaintiffs herein, obtained and registered in the Mortgage Book a judgment against A. H. Leonard, thereby acquiring a judicial mortgage on his property in Caddo.

On application of the executor, *ex parte*, the parish judge ordered that "he be authorized to pay the debts due by the succession by transferring to the creditors the twelve-months bonds given by the purchasers of the property at the said succession sale. This order was granted and its execution attempted to be carried out with some of the creditors. This was before there was any account rendered or classification of debts in the probate court, and before any judicial ascertainment of the solvency of the succession—that being yet an open and disputed question.

The twelve-months bond of A. H. Leonard was a large one—for \$13,600—larger than the debt of any one creditor. Thereupon the executor hit upon this novel device to meet the exigencies of the occasion. He found that the debts due Jacob Hoss, W. A. Pegram, and Louis Taylor amounted to \$11,041 32, or \$2558 68 less than the bond. He thereupon wrote upon the bond as follows: "This bond is credited with the sum of \$2558 68 of its date, and is now transferred to Jacob Hoss, W. A. Pegram, and Louis Taylor in payment of debts due them by estate of M. S. Cutliff, deceased, March 11, 1874.

"R. A. CUTLIFF, Executor."

The proof is direct and positive that not one dollar had been paid on said bond. Indeed, it is not stated in the indorsement that any *payment* had been made, but simply that "a credit" was put on it. It is shown that R. A. Cutliff was not under bond as executor and not responsible; that a vexatious litigation had been going on between him and some of the creditors—they trying to force him to give bond, and he trying to sell the property without doing so; that a sort of compromise was reached, and under the sanction of the court it was arranged that the sale should proceed and the funds should be deposited in bank, and the executor be not required to give security. This arrangement to give over these twelve-months bonds to the creditors was evidently a substitute for the "bank deposit scheme." By this arrangement it was expected that their collection by an irresponsible party would be avoided and the creditors secured. It needs no argument to show that an executor of a probably insolvent succession can not, by renouncing its rights, give away its effects; and it would seem equally certain that before the rendition of an account, and classification and ascertainment



## Snider vs. Cutliff.

of its debts, he can not, with or without the order of the court, set off and give to one creditor an asset of the estate, even at its face value, for the reason that the remaining assets might prove worthless, and the other creditors be left without any thing. Such a mode of settling successions is not to be tolerated; and we hold that the attempted assignment of Leonard's twelve-months bond did not divest the succession of its rights of ownership therein; and further, that the so-called *credit* indorsed thereon did not extinguish any part of the said bond.

Some time after this attempted assignment and credit, the creditors to whom the bond had been given returned it to the executor, who brought suit against A. H. Leonard to resolve the sale for non-payment of the price. Leonard answered the suit on the same day that the petition was filed, admitted the non-payment, and made no opposition to the dissolution. There was judgment dissolving the sale and restoring the property to the succession of Cutliff free of all incumbrances imposed on it by Leonard.

The plaintiffs bring this revocatory action to annul this judgment as obtained and consented to by their debtor Leonard, in fraud of their rights, and with intent to defeat their judicial mortgage on the property. The basis of plaintiffs' argument is that the succession of Cutliff had parted with the twelve-months bond, and did not therefore hold the debt due for the price of the sale, and had no interest in its resolution; that no one but the vendor himself can bring the resolatory action, and that therefore as the assignees of said bond could not do so they fraudulently interposed Cutliff, executor and vendor, to bring the suit. It is unnecessary for us to decide in this case whether the right of resolution passes or not to the transferee of the debt for the price. We may say, however, that we consider it an open question. Such being the cornerstone of plaintiff's pretension, our conclusion, stated above, that the estate of Cutliff, the vendor, does own the bond, would seem to remove it. *Sublato fundamento, casit opus.*

We think it highly probable that this action in resolution was prompted and necessitated by the fact that by not registering the bond in the mortgage office promptly the security of the debt was jeopardized by the interposition of plaintiffs' judicial mortgage. It can not be denied that if the price be not paid the vendor may resolve the sale. This is an indubitable right. Plaintiffs do not pretend that the price ever had been paid. On the contrary, they show that Leonard was and is hopelessly insolvent, which of itself is strongly presumptive of non-payment. It may have been wrong or wicked in him not to pay, and thereby he undoubtedly injured plaintiffs. But we do not see in this any reason why the executor of Cutliff should have allowed plaintiffs to swallow up the property of that estate, when by the exercise of a plain legal right it

could be averted. No doubt Leonard was gratified at the opportunity of getting rid of an elephant in the shape of a hotel, which plaintiffs' counsel assert was worth much less than he gave for it. Whatever were his motives, the vendor in exercising the remedy of resolution and thereby recovering a thing never paid for and honestly belonging to him, does no wrong to the creditors of the vendee. What equitable right have they to take property to pay their debts, when that property did not belong to their debtor, because not paid for? If they thought it their interest to keep the property in the patrimony of their debtor, they could have done so by exercising his right and paying the price to the vendor. But if the property be worth less than the price due, as is admittedly the case here, we are at a loss to see what wrong plaintiffs have suffered by having it taken back, and their debtor burdens thereby diminished. Plaintiff's claims has little to support in law and less in equity.

The judgment appealed from is correct, and is affirmed at costs of appellants.

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No. 866.

WILBERGA SCHNEIDER VS. ETNA LIFE INSURANCE CO.

A case will be remanded on the ground of newly discovered evidence filed in this court, whenever it shall appear that the ends of justice demand it.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo.  
*Land, J., ad hoc.*

*Looney & Elstner* for plaintiff and appellee.

*T. Alexander* and *T. F. Bell* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to recover three thousand dollars, the amount of a policy of insurance on the life of her husband, William Wackerle, of which she is the beneficiary. She had judgment in the lower court last December.

The defendant files in this court the affidavit of William Wackerle, made in San Francisco on the 24th of last month, in which he details his history, giving the names of his parents, of his wife, the date and circumstances of his marriage, the name of the priest who celebrated it, his removal from Minnesota where the marriage took place, his war service in company H, 9th. Regiment from that State, his residence in other States and finally in Quincy, Ill. where he left his wife in 1870, and went to Sacramento, Cal. and shortly afterwards to Hydesville in that State where he is now living, and does not know where his wife is, not having heard from her for several years.

There are other affidavits filed which were taken on the same day,

at the same place. Joseph Weinmann's is that he knew Wackerle in Minnesota, and his wife also—that he was a lieutenant of the company of volunteers, of which Wackerle was a member, and served with him, and has been in correspondence with him several years about obtaining a pension for him—that he is present while Wackerle is making his affidavit, and recognizes that affiant as the man whom he knew in Minnesota, and in military service, and whose wife's name was Wilberga. John Hein and Nicholas Hein swear that they were members of the company along with Wackerle, and give the name of the captain, as well as that of Weinman as lieutenant, and that have now before them then the same Wackerle, whom they recognize, and who has just then made the affidavit before mentioned.

It appears the affiant Wackerle then went to a photographer, and we have his affidavit that the photograph which he appends was taken by him on that day of a man who represented himself as William Wackerle.

The defendant thereupon prayed the court not to enter upon the consideration of the merits of the cause, but to remand it for a new trial upon this shewing. This motion, and the accompanying affidavits were filed on the 16th. of this month, the day after the transcript of appeal was filed. The plaintiff filed her counter-affidavit on the 17th., stating that she has just arrived at this place, and inspected the photograph, and read the affidavits filed by the defendant, and that the person thus photographed is not her late husband, and is not like him—that "her husband's hair was curly, different pointedly and distinctly from that of the photograph annexed, in fact in every feature there is no similarity between the photograph and her late husband, and that the affidavits as to identity are false."

The suit was filed in January 1877, and the answer at the ensuing April term, and the defendant then denied the death of the William Wackerle, whose life it had insured. During the interval between that and the December term numerous depositions were taken, and on the trial the plaintiff herself testified. She related her personal history, giving date and place of her marriage, the name of the priest-celebrant, which the clerk has spelled Wistman—*idem sonans* with Wissmann, the name given in Wackerle's affidavit—the subsequent journeys and removals of her husband and herself, and his final departure, as she says, for Texas. She heard of his death in that State in January 1873, she being then in St. Louis, and came on in April of that year. A labourer of the same name as her husband had been killed on the railway, by the passenger train crushing his leg, a few miles from Shreveport on Dec. 25, 1872. She proved to the satisfaction of the lower court that this man was her husband.

When a party to a suit dies after judgment in the lower court and before the appeal is heard, his counsel upon suggestion or proof of his death, moves in this court to have his representative made a party to the appeal, and it is granted as a matter of course. Here is a suit based upon the death of a person, and the suggestion is that he is alive, and the proof, filed with the suggestion, *ex-parte* and not entirely regular in its authentication, apparently supports it, while the plaintiff emphatically contradicts it.

We can not receive new and original evidence except for certain purposes, and there is no precedent in our Reports to this application. Nevertheless, it is the duty of courts to make precedents when the ends of justice demand it. If we should refuse this motion to remand, and proceed to the examination of the merits, and reverse the judgment already obtained by the plaintiff, she would in her application for rehearing no doubt join in the defendant's motion. If we should affirm the judgment, our concurring assent to the lower judge's belief in her husband's death would so firmly fix that belief in her own mind that she might abate any efforts to ascertain whether he be alive or not, while the defendant would have suffered a serious and irreparable wrong, if it shall in the end prove true that the William Wackerle who is now living in California is really the husband of the plaintiff.

We are not unmindful that under cover of a motion to remand for evidence subsequently discovered, attempts may be made to delay appeals in other cases, but the remedy is in our own hands, and the circumstances of the present application are extraordinary and exceptional. We shall give to both parties an opportunity to ascertain a fact so interesting to them.

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that this cause is remanded thereto for a new trial, the costs of this appeal to await final judgment therein.

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#### ON APPLICATION FOR REHEARING.

The plaintiff applies for a rehearing, and complains that we have granted more than the defendant in its motion asked. The rehearing is granted.

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#### ON REHEARING.

The motion of the defendant was to remand for the purpose of enabling it to verify by proof before the lower court the truth of the affidavits filed here in support of its motion. When we determined to remand, it occurred to us that we might possibly do the plaintiff an

injustice if we should confine the lower court to an examination of the sole question whether the insured was still living. But since she desires that question alone to be submitted, we shall make our decree in accordance with the wishes expressed in her counsel's brief. Therefore

It is ordered and decreed that our former judgment is set aside—that the judgment of the lower court is avoided and reversed—and that the case is remanded to the lower court solely to receive proof of the existence of the insured in manner and form as set forth in the motion of the defendant, and then to render judgment between the parties upon all the proof in the present record and that to be taken on the trial as herein ordered, and that the costs of this appeal await the final decision of the cause.

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No. 827.

NEWMAN BROTHERS vs. S. E. CUNEY.

The Parish Court has exclusive original jurisdiction in all ordinary suits, in which the sum involved is less than \$500 exclusive of interest.

This Court has appellate jurisdiction of all judgments rendered by the District Court in cases appealed from the Parish Courts, when the amount involved, including principal and interest, is more than \$500.

**A** PPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Ellis, Judge ad hoc.*

*Charles J. Boatner and S. L. Elam for plaintiffs and appellants.*

*John S. Boatner for defendant.*

The opinion of the court was delivered by

MARR, J. Newman Brothers obtained a judgment in the parish court, against Mrs. Jane C. Cuney, for \$398 73, with eight per cent interest from the third of January, 1869, which they caused to be recorded as a judicial mortgage. They afterward brought an hypothecary action, in the same court, against Stephen E. Cuney, to whom their judgment debtor had sold certain lands after the recording of the judgment; and obtained judgment, on the twenty-sixth April, 1875, for the \$398 73, with interest and costs, which was made executory and ordered to be enforced on the property standing in the name of Stephen E. Cuney, described in the judgment.

From this judgment Cuney appealed to the district court. He amended his pleading, and obtained a judgment annulling the judgment of the parish court, on the ground of want of jurisdiction. From this judgment Newman Brothers have appealed to this court; and Cuney moves to dismiss, on the ground that the judgment of the district court, on an appeal from the parish court, is final; and that this court is without jurisdiction.

The judgment of the parish court for \$398 73, with eight per cent interest from January 3, 1869, was for an amount largely in excess of \$500. According to article seventy-four of the Constitution, the jurisdiction of the Supreme Court "shall extend to all cases where the matter in dispute shall exceed five hundred dollars." The matter in dispute in the parish court and in the district court exceeded five hundred dollars; and this court has jurisdiction, by the express terms of article seventy-four of the Constitution.

By article 85 of the Constitution, the district courts have original jurisdiction in all civil cases where the amount in dispute exceeds five hundred dollars, "*exclusive of interest*;" and by article 87 the parish courts have exclusive original jurisdiction in ordinary suits, in all cases where the amount in dispute exceeds one hundred dollars, and does not exceed five hundred dollars. If these articles are taken literally there is no court in the State which could take jurisdiction of a case in which the capital sum, the amount of the debt, is five hundred dollars, if any interest whatever be due on it. The district courts can not take jurisdiction, because the capital sum due must exceed \$500, "*exclusive of interest*;" and the parish courts can not take jurisdiction, because the limit is "when the amount in dispute does not exceed five hundred dollars; that is, the amount in dispute, principal and interest, must not exceed \$500.

We had occasion to consider this subject fully in *Decklar vs. Frankengerger*, 30 An. 410; and our conclusion was that the words *exclusive of interest* must be supplied, with respect to the jurisdiction of the parish courts, so as to make the clause of article 87 in question read thus: "They shall have exclusive original jurisdiction in ordinary suits, in all cases where the amount in dispute exceeds one hundred dollars, and does not exceed five hundred dollars, *exclusive of interest*; subject to an appeal to the district court in all cases when the amount in contestation exceeds one hundred dollars, *exclusive of interest*."

The plain meaning of the articles eighty-five and eighty-seven is that the district courts have original jurisdiction when the capital sum, the amount in dispute, exceeds five hundred dollars, *exclusive of interest*; that the parish courts have exclusive original jurisdiction in all ordinary suits when the capital sum, the amount in dispute, does not exceed five hundred dollars, *exclusive of interest*; and that the district courts have appellate jurisdiction in all the ordinary suits falling within the jurisdiction of the parish courts, "when the amount in contestation exceeds one hundred dollars, *exclusive of interest*."

We have in this case all the elements of jurisdiction in the three courts. The capital sum is less than \$500: and therefore it falls within the exclusive original jurisdiction of the parish court. It falls within

the appellate jurisdiction of the district court, because the amount in dispute exceeds \$100, exclusive of interest; and it is subject to the jurisdiction of this court because the amount in dispute, principal and interest, exceeds \$500.

The judge of the district court erred in deciding that the parish court was without jurisdiction. We have no authority, on this appeal, to deal directly with the judgment of the parish court; but we have revisory power over the judgment of the district court.

It is therefore ordered, adjudged, and decreed that the judgment of the district court, appealed from, be annulled, avoided, and reversed; that this cause be remanded to the district court, with instructions to that court to proceed to hear and determine the appeal herein taken from the parish court to the district court, according to law, and the principles herein announced; and that the appellee, Stephen E. Cuney, pay the costs of this appeal.

#### DISSENTING OPINION.

DEBLANC, J. For the reasons given by me in "Adam Decklar vs. Frankenberger," I respectfully dissent from the opinion and decree in this case.

#### No. 864.

#### B. M. JOHNSON VS. MRS. JULIA MAYER ET. AL.

It is not an inconsistency in pleading, in a direct action to annul, to allege that a sale is simulated, and if not simulated that it is fraudulent.

A pretended sale by an insolvent debtor to one of his creditors, will be set aside on the petition of any other creditor.

**A**PPEAL from the Tenth Judicial District Court, parish of Caddo.  
*Boarman, J.*

*T. Alexander and N. C. Blanchard* for plaintiff and appellant.

*Land & Taylor* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. This is a direct action brought by plaintiff against Mrs. Julia Baer (wife of Mayer), and her vendees, L. Bodenheimer and Mrs. Marx Baer, in which plaintiff charges that he is a judgment creditor of Julia Baer—that she was insolvent on the 11th December, 1874—that on that day she executed what purported to be two acts of sale; one of a house and lot in Shreveport, to L. Bodenheimer, and one of sixty-acre tract of land to Mrs. Marx Baer.

He charges that these "pretended sales were and are fraudulent simulations and shams, entered into by said parties respectively to de-

30	1203
52	709
30	1203
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fraud the creditors of said Julia Baer, etc. That said Julia Baer never delivered said property to said pretended purchasers, but has continued in possession of the same herself all the time—that the pretended consideration of said sales has never been paid, etc.” He further alleges “that if said pretended sales had any reality or substance at all—which is denied—they were separately and collectively acts done in fraud of petitioner’s rights, knowingly and willfully by the parties thereto, etc.” “That if said Bodenheimer and Mrs. Marx Baer were creditors,” the said acts gave them a fraudulent preference, etc. He prays that said property be decreed to belong to his debtor, and that said acts be annulled and avoided in so far as they affect him, etc.

Defendants, Mrs. Mayer and Bodenheimer, filed an exception of misjoinder, in this, that they could not be joined as co-defendants with Mrs. Marx Baer. This exception was manifestly not well taken so far as Mrs. Mayer, the vendor, was concerned—she was necessarily joined with her vendees as defendant. Indeed, we see no legal objection to the joinder of Bodenheimer and Mrs. Marx Baer as co-defendants, since they are charged with conspiring with the debtor to defraud her creditors. *Williams vs. Hawthorne*, 14 A. 625. But whether this be so or not, it is unnecessary to decide, since before trial of the exception the plaintiff dismissed his suit as to Mrs. Marx Baer. Bodenheimer has no right to complain of this, since it left him precisely where he claimed a right to be, *i. e.*, to test his title separately and on its own merits.

The next plea filed by defendants was one to compel plaintiff to elect between the two grounds of his demand, to wit: simulation and fraud, on the ground that they are inconsistent. We have quoted the substance of plaintiff’s allegations. We see no inconsistency in saying that a sale is simulated, and if not simulated, that it is fraudulent. It is very like claiming a right by two titles. It has been held not inconsistent pleading to claim to be owner of a thing, and if not owner a privileged creditor on it.

When sales are attacked by a *direct action*, there is no reason why the party may not demand relief from them by alleging simulation or fraud, or both. We are not disposed to hamper the remedies of creditors, who resort to direct actions, by doubtful technicalities. In the class of cases now under consideration, the widest latitude should be given them, for they are necessarily to a great degree uninformed as to the precise relation existing between their debtor and his coadjutors in wrong-doing—often they are compelled to strike in the dark. If the purchaser’s title is an honest one, it is better for him that *the double test* be applied in one, instead of two suits. Little ground is there for him to complain, when he is called upon by citation and petition to verify the truth and reality of his title. The prayer of plaintiff’s petition is broad



enough to cover our decree, whether we hold the sale to be simulated or fraudulent.

Under the view we have taken of the merits of this case, the plea of prescription becomes immaterial, since we think that there is rarely found in judicial proceedings a clearer, bolder simulation than is disclosed by this record.

We find the facts to be as follows: Leopold Baer, a merchant of Shreveport, died during the epidemic, in September, 1873. He left considerable property—real and personal—a stock of goods, and credits. He made his wife, Mrs. Julia Baer (now Mayer), defendant herein, his sole heir and universal legatee. The will was probated, and by order of court she was put into absolute and unconditional possession. From that time she treated all the effects of the succession as her own—disposed of the goods, and collected the assets. There were large debts outstanding against the estate for which she became liable, and several of them were put into judgment against her—among them that of plaintiff. The personal property all disappeared, and there were only three pieces of real property, to wit: the dwelling sold to Bodenheimer, the tract of land sold to Mrs. Marx Baer, and a store in Shreveport—the latter incumbered by special mortgages fully up to its value. The defendants' counsel admit the existence of debts to amount of over \$13,000 on 11th December, 1874. We think evidence shows a greater sum. The only tangible property shown was the three pieces of real estate. The evidence satisfies us that after the depreciation in property took place in consequence of the epidemic and other causes in 1873 the debts exceeded considerably the property available for their payment. Mrs. Julia Baer was insolvent. On the 11th December, 1874, by public act she sold her residence to Bodenheimer for \$2400—acknowledging one third cash, and notes at one and two years for the balance, with interest; she retains no mortgage or privilege. On same day she sold the sixty acres of land to her sister-in-law, represented by her husband, Marx Baer, for \$1500 cash. The store, as we have said, was deeply mortgaged, and afterward sold out for little over half the mortgage debt.

Bodenheimer was a witness to the act of sale to Mrs. Marx Baer, was the intimate friend of the deceased, Leopold Baer, who was a merchant in good standing before his death in 1873. Bodenheimer was the partner of Levy, who, after L. Baer's death, acted as agent and adviser of the widow, till her remarriage with Mayer. Mrs. Julia Baer, the vendor of Bodenheimer, was living in the house at the time of the sale, and has ever since continued to live in it. She was not sworn as a witness. Bodenheimer was. He swears that the sale was *bona fide*. That the cash payment of \$800 was the amount of a debt due him by L. Baer since 1869, for which he never took or had any written evidence. That he has never paid either of the notes given for the price. That he rented

the house to his vendor at \$30 a month ever since he purchased it, but has never collected or demanded the rent up to date of his testimony, over three years after he acquired the property. He says he paid the taxes and insurance on it; and he intended to have the rents credited on his notes. This in one place he assigns as a reason for not paying them, leaving the inference that his vendor was to take the price out in rents. In another place he says he did not pay them because there was a suit against him for about ten feet of the lot. That suit was preceded by a trespass upon this property. The claimant tore down and moved a division fence. Before doing so he sent a messenger to Bodenheimer informing him of his intention, and asking him to come and see about it. Bodenheimer replied that "he had nothing to do with it." Mrs. Julia Baer, the occupant, protested violently against a man who would thus "possess himself of a widow woman's property," and said "go and see Mr. Bodenheimer, he is the agent of my affairs." The old adage is, "*in vino veritas*." The same is true of anger. These are small and apparently trifling circumstances, when weighed against the high-sounding periods of an authentic act. But straws are better indicators of the course of the wind than are the marble columns of some imposing temple. It is at unguarded moments that truth eludes the vigilance of fraud and exposes it to detection. "Trifles light as air" may become "confirmations strong as proofs of Holy Writ."

When we group all the facts of this case together—the insolvency of the debtor—the relations of intimate friendship between the parties—the stale debt (of more than doubtful existence) which is made to fill the role of cash payment—the continued possession of the vendor—the lease, with no payments of rent—the non-payment of any part of the notes given for the price—the indifference of the purchaser as to improvements made upon the property, and as to a very flagrant trespass upon it—the indignant assertion of ownership by the vendor in a moment of forgetfulness—who can doubt, especially in the face of the legal presumptions of articles 2480 and 3556, No. 25, that this whole transaction is a bold and fraudulent simulation, gotten up and concocted for the purpose of defrauding the creditors of Mrs. Julia Baer? We do not doubt it, and shall so decree.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now decreed that the sale made by Mrs. Julia Baer to Lazarus Bodenheimer, of the property described in plaintiff's petition of date December 11th, 1874, be and the same is declared a fraudulent simulation, and null and void, and that the same is liable and subject to plaintiff's judgment and mortgage.

It is further decreed that defendants pay costs of both courts, except those incurred in the lower court by process against Mrs. Marx Baer.

## M. L. SCOVEL vs. V. M. GILL.

He who contends that he is exonerated from an obligation on which he is sued, must prove the payment, or the fact which has extinguished the obligation. The possession by the creditor of property of his debtor, with the latter's consent, for the purpose of paying himself out of its hire, is an acknowledgment of the debt which interrupts prescription.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
*Boarman, J.*

*Wise & Herndon* for plaintiff and appellant.

*Wm. A. Seay* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 15th of June 1872, J. L. Gill, acting as defendant's agent, subscribed and endorsed two notes of each \$833.33½ c., payable to the order of his principal, one on the 1st of February, the other on the first of April 1873. Those notes passed into plaintiff's possession, and—according to the allegations of his petition—before maturity and for a valid consideration.

The defence is that V. H. Gill delivered to plaintiff his steamboat "Flavilla," to be run by him until enough money should be realized to liquidate the notes sued upon and other debts, and that her earnings were sufficient for the purpose.

In this Court, the prescription of five years is pleaded in bar of plaintiff's action on the note which matured on the 1st of February 1873, and—unless its course has been interrupted—that plea must prevail, the citation in this case having been served on defendant on the 23d of March 1878.

The consideration of the notes, and the power of J. L. Gill to draw and endorse them are not disputed, and the questions presented are:

1. Did the earnings of the Flavilla suffice to pay those notes, and—
2. If not, is plaintiff's action prescribed as to that which matured in February?

J. L. Gill, who is a brother of defendant, swore—on the trial—and we, here, transcribe his own words—that "he had turned over the steamer Flavilla to the plaintiff, to be run by him in the upper river trade, as he himself knew nothing of that trade. The understanding and agreement between them was that the earnings of the boat were to go to the payment of its indebtedness, and that—in said indebtedness—the notes sued on were included. Under that agreement, the boat was in defendant's possession for about three months, and—under his management—made four trips, the gross earnings of which J. L. Gill estimates at over twelve thousand dollars. This estimate is based, partly

on alleged admissions of the plaintiff and partly on conjectural calculations. He never—he said—leased the boat to Sale & Murphy.

Captain Scovel swore that he had no dealing with either J. L. or V. H. Gill, that the steamer *Flavilla* was turned over to him by Sale & Murphy, to be—as it was—run for exclusively their account, that they paid the salaries of the officers of the boat and other bills due by it, and received all its earnings. He did not render the settlement asked by J. L. Gill, for the reason that he had not been employed by him, but by Sale & Murphy, who advanced him fifteen hundred dollars, to settle for wages already due to the crew, when he took charge of the boat: its earnings were not sufficient to pay the current expenses and the money so advanced. The boat sunk twice and they had to pay damages for the injury done to the cotton on those occasions, but he did not state how much was paid.

J. L. Gill swore that he did not know where Captain Scovel got the money with which he paid the crew. A member of the firm of Sale & Murphy swore that J. L. Gill agreed with them that—if they would furnish the money to pay the crew—they would be the agents of the Boat, Scovel would go on it as captain, and that—out of its earnings—their advance, if made, would be the first paid. They made the advance, employed Scovel as captain at a fixed and stipulated salary; a satisfactory statement of every trip was given to them by the Clerk; that the season was bad and they did not get their money back.

What became of the statements which N. W. Murphy said had been regularly made to them by the Clerk of the Boat and which were satisfactory to them? Are they still in existence? Have they been entered on any book? Are they or the book accessible? Those statements would have been proper substitutes for the conjectures which fill this record.

Can we base our decree on plaintiff's declaration as to the amount of what was received for freight—not by him—but by the firm of Sale & Murphy—whilst the boat was under the control of the latter, as agents of Gill? What did he declare? That, when he took charge of the *Flavilla*, it was owing over three thousand dollars; their first trip up was light; he did not recollect what it amounted to, but thought it may have been from five to eight hundred dollars; on another trip, which he also states to be the first, and which—we presume—was its return from the upper river, they brought out 1025 bales of cotton, on which their share of charges received was three thousand and seventy-five dollars; they, thereafter carried to Shreveport a load of nine hundred bales, at from \$2.50 to \$6 by bale to New Orleans. How many at \$2.50 and how many at \$6, we are not informed. This cotton was re-shipped to New Orleans at \$1.50 per bale. After this, they made another trip; had on board a considerable freight, the charges on which he esti-

Scovel vs. Gill.

mates at from \$2500 to \$3000, but the boat sunk, a good deal of that freight was lost and no charge paid. On their trip from Hood's landing to Shreveport, they brought fifty bales, and—from upper Red River to Bargeton—five hundred. The costs of transportation on these two lots is not mentioned.

From the evidence adduced on the trial, we believe that the profits realized from the several trips did not exceed.....\$7600 00  
That, not including the damages which may have been paid for freight injured and lost, the expenses of the boat were at least..... 6231 98

leaving a balance of.....\$1368 02,  
less than required to satisfy the claim of Sale & Murphy, and that claim—it was expressly agreed—was the first to be paid out of the earnings of the Flavilla. The declarations of Murphy and Scovel that the steamer did not make enough to pay its current expenses and the claim of Sale & Murphy stand uncontradicted and contradict the plea of payment, which is not supported by the evidence.

“He, who contends that he is exonerated, must prove the payment or the fact which has produced the extinction of the obligation,” and this defendant has failed to do. C. C. 2232 (2229). Had those notes been paid, would he have left them in plaintiff's possession, without even demanding their return or their cancellation? That is highly improbable.

We think—as held by the district judge—that J. L. Gill, in giving the notes and in endeavoring to effect a settlement with Scovel in regard to said notes, was acting as the duly authorized agent of his brother, and—in that capacity—he acknowledged his brother's indebtedness, and promised that it would be satisfied out of funds which he expected to recover from a suit then pending at New Orleans. Not only did he, by words, acknowledge that indebtedness, but he did so by an act to which he himself has testified: in February 1873, when the first of the notes sued upon became due, he placed plaintiff in possession of the steamer Flavilla, for the purpose of securing the payment of those notes and of another claim, and that possession—which—in law and in fact—was a standing acknowledgment—continued until the latter part of April of that year. In *Montgomery et al vs. Levistones*, this Court held that “the possession by the creditor of property of his debtor, with the consent of the latter, for the purpose of paying himself out of its hire, is an acknowledgment of the debt which interrupts prescription.” 8. A. 145. 2. Troplong, Nos. 534, 618. C. C. 3461 (3424).

In this case, prescription was suspended from the first of February until the last day of the month of April, 1873, and had not been acquired

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 Scovel vs. Gill.
 

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when citation was served on the defendant. Under these circumstances, the plea of prescription can not be maintained.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is annulled, avoided and reversed, and, proceeding to render such judgment as should have been rendered below,

It is further ordered, adjudged and decreed that plaintiff—M. L. Scovel—do have judgment against the defendant—V. H. Gill—and recover of him the sum of sixteen hundred and sixty-six dollars and sixty-six and two-thirds cents, with interest thereon at the rate of eight per cent per annum, as follows: on one half of said sum from the first of February eighteen hundred and seventy-three, and on the balance from the first of April of the same year—(1873).

It is lastly ordered that the costs of the lower court and of the appeal be paid by defendant.

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 No. 858.

G. M. BAYLY & POND vs. STACEY & POLAND.

Parties who have made a composition under the bankrupt act with their creditors, retain the right to sue in their own names, for whatever may be due them.

Where a defendant alleges as a ground of defense, error, overcharges, and payment, and sets up a claim in reconvention on the basis of those allegations, he must set them forth with such particularity as to put the plaintiff on his guard, before he will be allowed to introduce evidence in proof of them.

Replications, under our law, are not admissible, and all the allegations of an answer are open to any objections of law or fact.

Pleas in reconvention require no service, and need not be put at issue by answer or default.

In the absence of a written agreement by the defendant to pay eight per cent per annum interest, only legal interest can be recovered.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
Boarman, J.

*T. F. Bell* for plaintiffs and appellees.

*Nutt & Leonard* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs sue defendants on account of certain debts paid for them and for goods sold, as shown by account annexed to petition.

Defendants excepted to plaintiffs' right to sue, alleging that plaintiffs had become bankrupt, and were no longer authorized to collect the assets of Bayly & Pond.

This exception was not well taken. The evidence shows that plaintiffs did make a surrender, but entered into a composition with their

creditors under the amendment of the bankrupt act, the effect of which left them in possession and control of their assets for the purposes of collection.

The answer is a general denial, admission of the signatures of the drafts sued on, but with special averments that they had done business with plaintiffs for some ten years; that on a fair settlement of accounts said plaintiffs owe respondents a large sum, at least \$5000, for this: that said plaintiffs charged respondents in said accounts interest at twelve per cent per annum, and even higher, when only five per cent should have been charged; and, further, that in rendering accounts from time to time plaintiffs brought forward incorrect balances by charging in different accounts the same items and by making incorrect and improper charges against respondents, and by failing to give respondents credits to which they are entitled. They pray that plaintiffs' demands be rejected, and for judgment in reconvention for \$5000. Plaintiffs filed an answer to this demand in reconvention, generally denying the same, and pleading prescription of one year.

On trial plaintiffs fully proved that the drafts sued upon represented the balance due by defendants to plaintiffs on a full settlement between them made June 12, 1875, and that the invoices of goods sold and sued for were true and correct, and interest computed at eight per cent.

Defendants tendered or offered in evidence proofs which they declared were intended to prove the errors, payments over, charges, etc., alleged by them and their claim in reconvention.

To this plaintiffs objected on the grounds: That the allegations of error, overcharges, credits, etc., made in the answer, were too vague and indefinite to admit of proof, and that any such defenses, based upon transactions prior to the settlement of June 12, 1875, must be set out with particularity and distinctness. The court sustained these objections (so far as relates to matters prior to June 12, 1875), and defendants excepted. The court did not err. When one pleads error, payment, and the like, he must set them forth with such particularity as will put his opponent on his guard; and a demand in reconvention must be made with the same specifcness and certainty as that of a plaintiff. This the answer of defendants did not do. It deals in generalities of the broadest kind, and does not disclose the particulars of the alleged errors, payments, etc., nor their dates, amounts, or other circumstance.

But the defendant contends that plaintiffs answered his reconventional demand without excepting to its generality, or to want of certainty in pleas of payment, error, etc., and thereby waived all right to object to evidence in support of them. He cites the case of Ludeling vs. Frellsen, 4 A. 534, in support of this proposition. That was a case where

the plaintiff in injunction alleged that she was entitled to a *specific sum* as credit on the execution enjoined, but did not specify the date or manner of payment. The defendant *in his answer specially traversed* and denied this allegation, and "expressly averred that all money ever paid \* \* \* to your respondents was appropriated by your respondents according to express directions, etc." The court held that these special denials and averments by the defendant prevented his objection to evidence by plaintiff to prove the alleged payment.

But the present case is a very different one. Replications in our law are not admissible, and all the allegations of the answer are open to any objection of law and fact. 3 N. S. 622, 687; 8 N. S. 141; 1 R. 335; 9 R. 504; 12 R. 648; 13 A. 412.

Pleas in reconvention require no service and need not be put at issue by answer or default. 1 L. 266; 2 L. 285; 3 L. 100; 10 A. 105.

The "general denial" filed by plaintiffs to defendants' reconvention was mere surplusage, and did not alter the attitude of the parties.

As we have said, pleas of payment, error, fraud in the answer, must be set out with reasonable certainty; as must also demands in compensation and reconvention; and if not so pleaded can not be proved if objected to. 2 N. S. 84; 5 N. S. 18; 6 L. 75; 11 R. 347; 4 A. 381.

Instead of moving to strike out or excepting to such defective pleading, "a more regular way is to permit the parties to go to trial, and reject on objection of opposite party any evidence to sustain them." *Jonau vs. Ferrand*, 3 R. 364.

It is fully shown that the defendants received regularly from plaintiffs statements of their accounts, had a full settlement on June 12, 1875, and made no objections thereto until threatened with suit.

We have in this record as late as September 7, 1875, a month after the last invoices sued upon, letter of the defendants to plaintiffs protesting their ability and determination to pay plaintiffs all they owed them, and especially the drafts sued upon. We see no error in plaintiffs' claim since June 12, 1875, sued upon. Our inquiry is confined to that.

We think, however, in the absence of written agreement to pay eight per cent interest the court below erred in awarding it. In this respect the judgment should be amended.

It is therefore ordered and decreed that the judgment appealed from be amended by reducing the rate of interest allowed therein from eight to five per cent, and that as thus amended said judgment be affirmed; appellees paying costs of appeal.



## Van Loan vs. Heffner, Sheriff.

No. 857.

A. H. VAN LOAN vs. WM. HEFFNER, SHERIFF.

One who claims a privilege on certain property has no right, merely on the ground of his having a privilege, to enjoin the foreclosure of a mortgage on the property.

A building contractor who fails to record his contract, acquires no privilege on the building, so far as third persons are concerned.

Those are third persons to a contract who are not parties to it.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
Boorman, J.

C. C. Henderson and J. W. Jones for plaintiff and appellant.

W. H. Wise for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. The assignees of the Southern Life Insurance Company caused the Shreveport University to be seized under a *fi. fa.* issued under a judgment for \$22,500, in favor of said Insurance Company, which judgment recognized a special mortgage on said property.

The plaintiff Van Loan asks to enjoin that sale, on the ground that he has a superior lien and privilege on the property seized, as contractor and builder.

This allegation was no ground for injunction, which was of course wrongfully ordered to issue. His remedy was third opposition. He had no right to prevent the sale. This is elementary.

It appears that Van Loan entered into a contract with the corporation known as the Shreveport University, on the 4th day of December, 1872, whereby he agreed to make certain buildings on the property seized. He did the work, but never recorded his contract, which was one for several thousands of dollars. A few days after this contract, the Southern Life Insurance Company made a loan of money to the University Company, taking special mortgage to secure it on the property in question. A short time after, two other loans were made, secured by mortgage also. All these mortgages were duly recorded. The constitution of 1868 provides (Art. 123), "No mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated." This provision has been carried into the Code of 1870, in even more emphatic terms, if possible.

The only question, therefore, open to controversy in this case is, Was the Southern Life Insurance Company of Memphis, Tenn., a third person? The Civil Code, Art. 3556, No. 32, defines third persons, "with respect to a contract or judgment," as "all who are not parties to it." There is no pretense that the Insurance Company was a party to this building contract. It is said that Judge Egan, who acted as agent of the company under a special authority to accept the mortgage, must have

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 Van Loan vs. Heffner, Sheriff.
 

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known of this building contract, because the notary before whom it was passed was his law partner. Even if actual notice in such cases be equivalent to registry, this fact does not prove that notice, or that the Insurance Company was privy to it. No more does the asserted fact that Rev. Mr. Drain, who was the agent of the Insurance Company in negotiating this loan, knew or supposed that the money was to be used in building on the property. This belief or supposition would have rather led him to conclude there would be no builder's lien, since the money was being provided to pay for the work. It is not stated in the act of mortgage that such was the purpose of the loan.

The judgment below rejected plaintiff's claim for priority, and recognized defendant's mortgages as first in rank, but awarded no damages for the wrongful suing out of the injunction. We are asked to amend the judgment by allowing damages. We find in the record a petition, order, and bond for injunction, but no writ. Under these facts we decline to allow damages, as it may be that no writ issued.

Judgment appealed from is affirmed at cost of appellant.

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 No. 808.

W. C. MARTIN vs. H. W. KIRKPATRICK, SHERIFF, ET AL.

The homestead law of 1865 does not give to the family of a debtor any such rights in his property as will prevent him from making valid confessions of judgment on debts that are prescribed.

Homestead laws exempting property from seizure and sale are wholly inoperative and void as to debts created before the passage of such laws.

**A** PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Grakam, J.*

*John S. Young and George & Taylor* for plaintiff and appellant.

*John Young* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. On March 26, 1872, R. L. Capus brought suit against W. C. Martin on two promissory notes, one for \$380, due March 1, 1861, and secured by special authentic mortgage on the lands hereinafter mentioned; the other for \$208 09 dated on and payable one day after February 7, 1867. It is admitted that this last note was given as evidence of a pre-existing debt created prior to the homestead act of 1865. After defendant, Martin, had been cited he confessed judgment in writing on the back of the petition "for the principal of the notes; the judgment to be divided into five annual installments \* \* \* \* each installment to bear interest from their respective maturities," etc. Judgment was entered up and signed October 23, 1872, reciting that "by rea-

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Martin vs. Kirkpatrick, Sheriff.

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son of the law and evidence being in favor of plaintiff and against defendant, and by further reason of the confession of the defendant, it is ordered, etc." The judgment is for the principal of the notes as provided in the confession, but with recognition of the mortgage securing the \$380 note.

In February, 1877, no portion of this judgment having been paid, an execution was issued for the matured installments, and the sheriff seized 200 acres of the land embraced in the mortgage, the balance thereof having passed by deed to third persons.

Martin, thereupon, brought this suit; alleging "that the rendition and signing of said judgment was procured by fraud and ill-practice on the part of Capus, and his attorneys, in this: that said suit was upon two promissory notes prescribed upon their face, etc., \* \* \* one secured by special mortgage, which had perempted," etc. The substance of Martin's attack on the judgment is that the mortgage was fraudulently procured to be recognized by the judgment, when it was not intended or embraced in the agreement for the confession. The attack, both in the pleadings and proofs, is limited to the recognition of the mortgage.

Martin also enjoins the execution to the extent of 160 acres on a claim of homestead, under the act 1865.

Under the view we have taken it is matter of no moment whether the mortgage was or not properly recognized by the judgment, and we shall treat the judgment for the purposes of this case simply as one *in personam*, rendered in 1872 upon debts existing prior to the homestead act of 1865. In that view the counsel of Martin argues:

1. That when this judgment was confessed in 1872 the notes sued on were prescribed on their face; and that the renunciation thereof resulting from Martin's confession could not operate so as to impart to said notes the character of debts contracted prior to 1865, and thereby defeat the right of homestead, an exemption created in the public interest for the benefit and protection of Martin's family. In other words, so far as relates to this claim of homestead, said debts must be treated as of the date of the judgment in 1872. That Martin could not waive the homestead as it is said, was decided by a majority of this court in *Hardin vs. Wolf*, 29 A. p. 333. That as to this right of homestead the family of Martin are third parties, and Martin's renunciation of prescription can not affect them.

2. It is further contended that if said judgment be considered only as an ordinary debt existing prior to the passage of the homestead act the latter is good against it.

1. As to the notes being prescribed at the date of the confession and judgment, that may or may not be true in fact. Prescription is only

a means of extinguishing obligations, but must be pleaded to have that effect. A promissory note, since the maturity of which more than five years have run, is a valid, subsisting obligation, until prescription is *pleaded against it* by the debtor, or by his creditors if he be insolvent. Martin's failing to plead prescription, his recognition and confession, simply continued in existence a pre-existing obligation. His right and power to do this is indubitable, so far as the act affected himself, his heirs, and legal representatives. But he could not do so to the prejudice of the rights of third persons acquired in the meantime. This brings us to the question whether Martin's family occupy the position of third persons who had in 1865 acquired a right of homestead on Martin's property. If so, he could not waive his right of pleading prescription to their prejudice.

Now, it has often been said that the homestead act is exceptional and in derogation of the general and universal rules of law, which make a man's property liable for his debts; that, therefore, it must be strictly construed, and can not be extended by implication.

When we turn to that act we find that its benefits can be invoked and claimed only "by the debtor" who occupies the land "as a residence, and *bona fide* owns it, having a family, or mother, or father, or person or persons dependent upon him for support." It is the debtor who is vested with this right. He alone can claim it and exercise it, upon the conditions stated. If it were the family in whom the right was vested, it would render the property subject to the right inalienable by the debtor, and the right could only be asserted in the name of those in whom it was vested.

2. The only remaining question is, Can the homestead act be pleaded against debts created prior to its passage? This depends upon the question whether the act would, when so applied, impair the obligation of contracts; and, therefore, whether it can be so enforced without violating the Constitution of the United States. This question has been finally and authoritatively settled by the Supreme Court of the United States, in a late opinion rendered at the October term, 1877, in the case of *Edwards vs. Kearzy*, and brought by writ of error from the Supreme Court of North Carolina.

By the constitution of North Carolina adopted in 1868, personal property to the value of \$500, and real estate to the value of \$1000, are exempted from seizure and sale "under execution or other final process issued for the collection of any debt." *Edwards*, subsequently to the going into effect of this constitution, obtained against the defendant three judgments upon debts created prior to the adoption of said constitution. The Supreme Court of North Carolina maintained the defendant's homestead against the enforcement of these judgments, and the case was carried by writ of error to the Supreme Court of the United

States, whose decision upon questions involving the interpretation of the Constitution of the United States commands our acquiescence. That opinion is elaborate and exhaustive, and the decree received the approval of all the judges. It holds that so far as relates to debts created before the adoption of the constitutional provision exempting a homestead said provision is inoperative and void, and forbidden by the Constitution of the United States, as impairing the obligation of contracts by destroying the remedy in material respects. "The remedy," says the Court, "subsisting in a State when and where a contract is made and is to be performed is a *part of its obligation*, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

We do not think this a proper case to inflict damages beyond that allowed by the lower court.

The judgment appealed from is affirmed with costs.

DEBLANC, J. I do not concur in the opinion and decree of the Court, and reserve the right to hereafter file a dissenting opinion in this case.

No. 802.

STATE EX REL. NEW-ORLEANS PACIFIC RAILROAD COMPANY VS. FRANCIS T. NICHOLLS ET AL.

Where by an act of the Legislature bonds of the State are authorized to be issued and loaned to a corporation, on condition that it shall pledge certain of its own mortgage bonds, payable forty years after their execution, to secure the State, the tender of bonds by the corporation, the payment of all of which is made exigible whenever there shall be a six-months default in the payment of the interest on any of said bonds, is not such a compliance with the law, as will authorize the corporation to demand the issue of the State bonds. The fact that the bonds of the corporation, tendered as a pledge, are dated before the passage of the law authorizing the loan, and that they are made payable, at the holder's option, at another place in addition to that prescribed in the act, is immaterial.

Where the act of the Legislature authorizing a loan of the State's credit on the security of a certain mortgage, is silent as to the question of the appraisement of the property covered by the mortgage, in case of its forced sale, it will be assumed that the Legislature designed that such a forced sale should only take place after the usual appraisement provided for by law.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J. Kennard, Howe & Prentiss* for plaintiff and appellant.

*J. C. Egan*, Assistant Attorney General, and *H. N. Ogden*, Attorney General, for defendants and appellees.

The opinion of the court was delivered by

MARR, J. By act 68, of 1878, p. 105, the Legislature authorized and

required the Governor to issue to the New-Orleans Pacific Railway Company bonds of the State, to be signed by him and countersigned by the Auditor and the Secretary of State, with the seal of the State affixed, to an amount not exceeding two millions of dollars, to be for one thousand dollars each, having forty years to run, bearing interest at six per cent per annum, payable semi-annually, and having semi-annual coupons attached.

Section 2 of this act, as a guarantee for the prompt payment of the interest on these bonds, as it shall mature, and of the principal, on or before the expiration of the period during which they are to run, requires the railway company to deposit with the Auditor of Public Accounts, and to pledge to the State for that purpose its bonds, secured by first mortgage of all its property, real and personal, present and future, such deposit and pledge to exceed by one fourth, in each case, the amount of the State bonds delivered to the company.

"The said company, on resolution of its board of directors, is authorized to make such a mortgage, and the same shall cover and affect as a first mortgage all property of said company, whether real or personal, present or future, now owned or hereafter acquired, and whether now constructed or hereafter constructed. The amount of bonds secured by said mortgage shall not exceed five millions of dollars, it being intended that one half of the same may be pledged to the State, as aforesaid, and the other half disposed of to other parties. *The said mortgage bonds shall have forty years to run; shall bear interest at six per cent per annum; shall have semi-annual coupons attached, and said coupons shall fall due at or prior to the time at which the coupons of the said State bonds shall fall due; and the interest paid on its bonds by the company to the State as pledgee shall at once form a fund and be used to pay the interest on the State bonds which shall have been issued to the company.*

"The said company shall further bind itself in said pledge to extinguish annually fifty thousand dollars of said State bonds, commencing five years after the completion of its line to Shreveport, and continue the extinguishment at such annual rate up to five years prior to the maturity of said State bonds; and during the last five years it shall, under the same pledge, agree to take up and extinguish one fifth each year of the amount of said State bonds then outstanding."

Section 3 makes it the duty of the Auditor or other officer having custody of the mortgage bonds pledged by the company, when a sufficient sum is not provided by the company to meet a maturing coupon, to sell at public auction after ten days advertisement a sufficient amount of the mortgage bonds to pay such maturing coupon and the expenses of the sale.

Section 4 requires the issue of two hundred and fifty State bonds immediately on the going into effect of this act. Subsequent issues, up to the amount limited, are to be at the rate of ten thousand dollars per mile for every section of ten miles of the road graded, bridged, and metaled.

This act was approved eleventh March, 1878; and it went into effect from its passage: and, shortly after, the company demanded the bonds for \$250,000. The Governor doubted the constitutionality of the act; and the question was finally determined by this court, by a decree which declared the act to be not in violation of the constitution of the State. See the case, 30 An., not yet published.

On the first March, 1878, before the passage of this act, the company, by authority of a resolution of the board of directors, adopted on the sixteenth August, 1877, and of the acts of the Legislature, No. 14, of 1876, p. 28, and No. 12 of 1878, p. 37, confirming and amending the notarial charter, executed a first mortgage of all its property, real and personal, present and future, and its rights and franchises, to secure principal and interest of five thousand bonds, of one thousand dollars each, payable in New-Orleans or New York, at the option of holders, having forty years to run, bearing six per cent interest, payable semi-annually, with coupons attached, with waiver, in the act of mortgage, "of the benefit of any extension, or stay, or appraisement laws now existing, or which may hereafter exist, in the States of Louisiana and Texas."

By another clause in the act of mortgage it is expressly stipulated that "if the company, or its successors or assigns, shall, at any time hereafter, after demand made, make default, or neglect, or refuse, or omit to pay the semi-annual interest on said bonds, or any of them, when the same shall become due, and if any such default shall continue for the period of six months, then, upon demand of any holder of any one or more of said bonds, the whole principal sum of each and all the bonds then outstanding, and intended to be hereby secured, shall forthwith become due, exigible, and payable."

On the thirty-first May, shortly after the decision of this court declaring the act of eleventh March, 1878, constitutional, the company tendered a notarial act pledging three hundred and thirteen of these bonds, and embodying the terms and conditions of section 2, of the act of eleventh March; and it demanded the issue and delivery of two hundred and fifty State bonds. The Governor was not satisfied with the terms and conditions of the bonds of the company and of the act of mortgage; and he declined to deliver the bonds of the State as demanded. Thereupon the company brought suit against the Governor, the Auditor, and the Secretary of State, to compel, by mandamus, compliance with its demand.

The answer alleges that the company has not complied with the obligations imposed upon it by law, conditions precedent to the delivery of the bonds of the State: "Nor has the relator placed the State in the situation in which she is directed to be placed, by law, before any of the bonds authorized to be issued by act No. 68, of 1878, can be issued.

"Respondents are public officers, with limited powers, acting under a special law, and are not authorized to vary from it, or exercise any discretionary power in the matter."

Respondents specially object to the stipulation in the bonds making them payable in New York at the option of holders; and to the clauses in the act of mortgage waiving the benefit of appraisement, and making the whole of the outstanding bonds due, exigible, and payable on the failure of the company to pay the interest due at any time for the space of six months; and they allege that "these variations from the law are of the most serious character, and will greatly injure the State, in view of the fact that the relators have disposed, or are authorized to dispose, to other persons than the State, of two millions and a half of similar bonds, secured by similar mortgage."

The district court refused to grant the mandamus as prayed for, mainly on the ground of want of authority to interfere with the discretion of the Governor; and the company appealed.

The Attorney General informs us, in his oral argument, that the Governor desires to make no question as to whether his power in reference to the issuing of these bonds is discretionary; nor as to the authority of the judicial tribunals to control him in the performance of his official duties. The Auditor and the Secretary of State, parties appellees, are charged with important functions with respect to the issuing of these bonds; and the judiciary has unquestioned power, in proper cases, to compel them to perform the ministerial duties absolutely required of them, respectively, by law. We shall proceed, therefore, to consider the case, without reference to our authority to deal judicially with the Governor, premising that judicial power is the creature of the law; and that it can not be enlarged by mere consent.

It is of no consequence that the bonds of the company, and the mortgage to secure them, are dated first March, 1878, anterior to the passage of the act of eleventh March, provided they meet the requirements of that act. By the acts of 1876, p. 28, and 1878, p. 37, and the resolution of the board of directors of sixteenth August, 1877, the company was fully authorized to issue its bonds to the amount of five millions, and to secure them by mortgage and pledge. Their validity is not affected by the date; since the bonds are not obligatory, and the mortgage and pledge are not operative until the bonds are actually issued. The terms of the mortgage are such that it secures any holder as effect-



ually as if he had been an original contracting party, a mortgagee. It would not have been unwise for the company to have deferred the execution of the bonds and the mortgage until the act of eleventh March had become a law, in order to have made them in conformity with its terms and conditions.

Equally unimportant is it that the bonds are made payable in New Orleans or New York, at the option of holders, since their value as security to the State is in no manner thereby diminished, and their market value may be enhanced.

The serious question is whether the waiver of the benefit of appraisement, and the clause in the act of mortgage by which the whole of the outstanding bonds may become due and exigible at any time at the will of any holder of even one of them, by the failure of the company for six months to pay the interest due, impair the value of the security contemplated and required by the Legislature, as a pledge and guarantee upon which the aid of the State is to be given to the company; whether these clauses in the act of mortgage are not a variation, a departure from the terms prescribed by the Legislature, by which the peril and liability of the State are increased beyond the risk which the Legislature intended and consented to incur.

The Legislature had the right to prescribe the terms and conditions upon which the aid of the State should be granted to the company. A gratuity, a donation to the company was not intended; and it was the duty of the Legislature to see that the credit of the State, which it designed and consented to lend to the company, should be fully secured and protected. The mere reading of the act will show how carefully it seeks to accomplish this purpose. The amount of the first-mortgage bonds of the company is limited, and is small compared with the cost of constructing the entire road; and one half only of those bonds is to be put upon the market, the other half to be reserved to be pledged to the State. These bonds are to have the same period to run as the bonds of the State: they are to bear the same rate of interest, payable semi-annually, at or prior to the time at which the interest on the State bonds will be exigible. When bonds of the State are issued to the company, the bonds of the company, for an amount exceeding by one fourth the amount of the State bonds so issued, are to be deposited with the Auditor of Public Accounts, and be pledged to the State, secured by first mortgage on all the property of the company, present and future; and to secure the State against the inconvenience of advancing even the semi-annual interest on its bonds, the officer of the State having the custody of the pledged bonds of the company is required to sell, on short notice, a sufficient amount of them to make good any deficiency or failure of the company to provide for the maturing coupons.

Again; the company is required to extinguish annually fifty thousand dollars of the bonds of the State, commencing five years after the completion of the road to Shreveport; and, during the last five years of the running of the bonds, to extinguish, annually, one fifth of the remainder outstanding. It was not the intention of the Legislature to tax the overburdened people of the State by giving, or advancing temporarily, a single dollar to the company; and while it was deemed proper to aid the company in its great enterprise, the importance of which is so manifest, by lending the credit of the State to secure the early completion of the road within the limits of the State, the terms and conditions upon which this assistance is to be granted are such that a compliance with them by the company would save the State from loss, or even inconvenience.

It must be assumed, as there is nothing in the act of eleventh March indicating a different purpose or intention, that the Legislature contemplated and designed that the mortgage and pledge should be, in all respects, in conformity with and should subject the property to the existing laws of the State. By the existing laws the property of the debtor can not be sold for cash for less than two thirds of its value, as fixed by two sworn appraisers, one of whom may be selected by the debtor, the other by the creditor. If two thirds of the appraised value should not be bid, the property may be re-advertised and sold for whatever it will bring on twelve-months credit.

This is considered a wise regulation, since it prevents the sacrifice of the property, and protects the creditor, who may not be able or willing to buy it for cash, against a sale which would be prejudicial to him by the insignificance of the price. The importance of this provision of the law can not be overestimated in this case, when it is considered in connection with the clause in the mortgage by which the entire mortgage debt may become due and payable, and the mortgaged property may be forced upon the market at any time, however unpropitious.

The clause by which the mortgage bonds may become due and exigible before the expiration of the forty years may be attributed to the difference between our law and the systems prevailing in the other States of the Union, with respect to the enforcement of mortgage rights; and to the fact that the principal market for railway bonds is the great commercial emporium where our system is comparatively unknown. Under the system prevailing in the other States, generally, a mortgage can not be foreclosed and the mortgaged property sold until the whole mortgage debt is due and exigible; and there is no doubt that the object of the company in inserting this clause was to enhance the market value of the disposable half of these bonds, by conforming to the usual stipulation in railway mortgages in the other States, by which the punc-

tual payment of the interest is secured, under penalty of the immediate maturity of the entire mortgage debt, and the speedy foreclosure of the mortgage, and sale of the mortgaged property. No doubt this stipulation adds to the market value of the bonds; but the usual consequence is that the mortgaged property is sacrificed; and the holders of the bonds combine and become the owners of the property and franchises of the company.

Under our system it is not necessary for the mortgage creditor to wait until the entire mortgage debt is due. If any part of it be due he may proceed by executory process, without citation of the mortgagor, on an *ex-parte* order of the competent judge, in term or at chambers, under which the entire mortgaged property may be sold, within less than sixty days, for such sum in cash as will satisfy the matured debt, and the costs, and on terms of credit corresponding with the maturity of the remainder, which, to the extent of the price bid the purchaser, must assume and pay as it shall mature.

Under this system mortgage securities, having a long term to run, may not be so attractive to large dealers as they would be under a contract which would authorize any holder to have the mortgaged property sold for cash, at any time, for the entire mortgage debt. But the State of Louisiana consented to advance its bonds to this company on terms and conditions which would be defeated by the maturing of the bonds of the company, and the forced sale of the mortgaged property for cash, at any time before the extinguishment of the bonds of the State. It was not the object of the Legislature to enable holders to hasten the maturity of these bonds, nor to furnish the means of having the mortgaged property speedily sold for cash at whatever price. The entire purpose and design of the act of eleventh March was to provide a fund to meet punctually the current interest as it should accrue, and to insure the final payment and extinguishment of the two millions of accommodation bonds of the State having a period of forty years to run. The Legislature intended that the bonds of the State should be protected by the precise security prescribed in the act, leaving that portion of the bonds of the company put upon the market to stand upon their own merits: and while the State could not avoid the risk of a sale of the whole of the mortgaged property to pay the entire mortgage debt, in the event of the failure of the company, at any time, to pay the semi-annual interest, on the disposable half of the bonds, a sale in accordance with our law for cash to meet the matured part of the debt, and on terms of credit corresponding with the part of the debt to mature, principal and interest, according to the tenor of the bonds, would be far less prejudicial to the State than a sale for cash without appraisalment.

Under our system the rights of holders, especially those who seek

permanent investments in mortgage securities, are better protected than they would be under a contract by which the entire mortgage debt may become due, on the failure of the mortgagor to pay the current interest as it matures, and the whole of the mortgaged property be sold for cash without appraisement. Such an accessory contract abrogates the principal contract as expressed on the face of the bonds; while our system respects the contract as thus expressed, and enforces it, as nearly as possible, by divesting the title and possession of the defaulting mortgagor, and subjecting the purchaser to his obligations, and making him paymaster, to the extent of the price, in lieu of the original mortgagor. Under our system no express stipulation in the mortgage is necessary to enable the holder of any part of the mortgage debt to enforce the payment of whatever may be actually due, as well to himself as to other holders; and the mortgagor can not be crushed by the hastened maturity of the entire debt, which he contracted and intended to pay at the expiration of a long term.

It may be difficult, as urged by counsel for appellant, to negotiate the bonds of the company without a mortgage containing the clauses under consideration; but we can see no good reason for this, since our law affords every requisite facility for the enforcement of mortgage rights by process exceptional, speedy, and summary. It may be that these clauses are usual in railway mortgages of recent date in this and in other States. Individuals and corporations contracting in their own right for their own interest alone may make such stipulations and agreements as they think proper; and capitalists will judge and determine for themselves whether the security upon which they are invited to invest is satisfactory and such as they require. But those who contract with a sovereign State must submit to the terms which it chooses to prescribe; and when the Legislature, in an act so precise and minute in its details as that of eleventh March, 1878, declares the terms and conditions on which the State shall bind itself, there is no other department of the government that can change these terms and conditions, or undertake to say that any thing short of a strict compliance with them would meet and satisfy the requirements of the law.

The Legislature chose to require, for the security of the State, that the first-mortgage bonds of the company should have forty years to run, without qualification; and when the company agreed that these bonds, nominally having forty years to run, should, on failure to pay the interest, become immediately due and exigible, this was a qualification which the Legislature had not chosen to express in the act: which, for all that appears, was never submitted to the consideration of the Legislature; and to which the Legislature has not in any manner consented.

The officers whose duty it is, by the act of March 11, to execute and

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State ex rel. New-Orleans Pacific Railroad Company vs. Nicholls.

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deliver to the company the bonds of the State for two millions have no power or authority to accept any other or different security than that required by the express terms of the act. The Governor, the Auditor, and the Secretary of State, defendants and appellees in this case, well said in their answer: "We are public officers, with limited powers, acting under a special law, not authorized to vary from it, or exercise any discretionary power in the matter."

The judge of the district court did not err in refusing the mandamus; and the judgment appealed from is therefore affirmed with costs.

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No. 788.

McLEAR & KENDALL VS. SUCCESSION OF J. L. HUNSICKER.

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The testimony of a party to a suit may be taken under commission, like that of any other witness.

Payments made by a debtor without special instructions as to their imputation, will be imputed in accordance with the tacit agreement of the parties as disclosed by their dealings and correspondence.

A debtor who receives, without objection, an account current from his creditor which imputes payments made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payment made in the account.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*Franklin Garrett* for plaintiffs and appellants.

*Frank P. Stubbs* and *W. W. Farmer* for defendant.

The opinion of the court was delivered by

SPENCER, J. This case was before us at the July term, 1877, and was remanded. See 29 A. p. 539.

It is a suit on four promissory notes, executed by the deceased, in favor of the plaintiffs, in the course of business between them—which course of business consisted in plaintiffs selling and furnishing to defendant carriages, wagons, etc., of their manufacture, from time to time as ordered by him, and remittances by defendant at like periods of sums of money in payment. Plaintiffs, from October, 1868, when these transactions began, to the close thereof, sold and shipped defendant goods of the character stated to an amount of nearly \$7000, as shown by the accounts and proofs in this case. Defendant was to pay for goods at four months time, and for some of these invoices and in settlement of account he executed the notes in question, to wit: one for \$821, due February 10-13, 1869; one for \$899, due March 12-15, 1869; one for \$510, due June 11-14, 1872, and one for \$500, due March 7-10, 1873. These notes so given, save and except the first one, at no time equaled the amount due

plaintiffs on account; crediting them on the account, there always existed considerable and sometimes large balances due plaintiffs.

There is no room, under the evidence in this case, to doubt that plaintiffs furnished every dollar of the goods charged in their accounts; nor is there more doubt as to the amounts of money remitted by the defendant, as payments of his indebtedness. The whole transaction is laid bare by the correspondence between the parties, and the other proofs in the record. The only real contest is that as to the imputation of these payments; plaintiffs contending that they should be made to the open or book account, and defendant's administratrix that they should be made to the notes. Plaintiffs sue on the notes, and defendant pleads payment. We may here remark that we do not think defendant's bill of exceptions to the depositions of plaintiffs as witnesses in their own behalf, taken under commission, is well taken. The law makes them competent witnesses, and we know no rule which excludes them from the right to take their own testimony like that of other witnesses. When witnesses reside out of the parish, their evidence may be taken under commission. The law does not except parties to the suit.

There can be no doubt of the correctness of the proposition, that in the absence of an agreement, or of circumstances indicating a contrary intention, payments should be imputed, on debts due, rather than on those not due; and of debts due, to those most onerous in preference to those less onerous. It is equally well settled that, as a general proposition, notes create a more onerous debt than open accounts.

It only remains for us to examine how far those principles have been varied in this case by the agreements or consents of parties expressed or implied from the circumstances and course of dealing between them.

The correspondence between these parties shows that the \$500 remitted by Hunsicker, and received by plaintiffs on February 22, 1869, was applied as a payment on the \$821 note. It is so expressly stated by plaintiffs in their letter of that date, signed by their clerk, McGraw, and in which they urge their debtor to send forward the balance, \$321, and \$5 41 protest fees. Plaintiffs say in their testimony this letter was unauthorized by them; but on the 18th March following the firm itself writes to Hunsicker, urging him to remit the balance, \$326 41, due on that note.

On February 24th, 1870, plaintiffs write Hunsicker an urgent letter, saying his debt to them exceeds \$4000, and that he must at once remit them at least \$3000. On April 13th, 1870, they send him a statement of his account showing on first April a balance against him on "book account" of \$3256 41. They add memorandum of the note for \$899, and of a separate account of Kendall, for harness bought for Hunsicker,

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McLear & Kendall vs. Succession of Hunsicker.

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\$284, showing, therefore, a total indebtedness of \$4439 41. On June 24th, 1870, Hunsicker acknowledges receipt of the account, and makes earnest protestations of his wishes and anxiety to pay. In this statement of the "book account" the note for \$821 is charged to Hunsicker and the \$500 above referred to is credited. But the \$899 note does not figure in it, but is added as a memorandum at the bottom. Hunsicker's credits by "cash" on this book account amount to \$2250, and the last item thereof is \$200, on 2d March, 1870. By this account this sum of \$2250 was imputed to Hunsicker's "book account," into which had been carried his note for \$821. As we have seen, he received this account and made no objection to the application of the payments. This amounted to a consent on his part.

On August 1st, 1871, plaintiffs furnished Hunsicker another statement of accounts, which is a mere continuation of that of April 1st, 1870, and on which they credit him with additional "cash" remittances amounting to \$1050, and also with a note (of one Falk, we presume,) for \$200. The \$899 note is not charged in this account, but is again added as a memorandum below the "balance on the book account." Hunsicker's letter of August 21st, 1871, shows that he received this statement of accounts also, for he says, "you sent me a statement some time back, but I have mislaid it. Please send me another, and I will try again, and see whether I can not get you some money together." Here again by the tacit consent of Hunsicker these \$1050 were imputed to the "book account."

Plaintiffs' letters of July 15, and November 21, and December 10, 1872, show receipts of \$150 in money, which they applied, as they state, as follows: \$250 on the \$510 note and \$200 to the Falk note, which they returned to Hunsicker.

The only other payments made which can be imputed to the notes are as follows: \$150 on March 17th, 1873, and \$100 on March 24th, 1873, as shown by receipts of those dates, in which it is specified that these payments are on account of notes.

In Hunsicker's letter of date April 30th, 1873—only a short time before his death—he clearly recognizes that plaintiffs are the holders of more than one of his notes which were due and unpaid. In the face of that letter, and of the proofs in this record, it can not be affirmed that plaintiffs are seeking to defraud his estate. Under the terms of that letter and of the facts detailed above it would be exceedingly inequitable, as well as contrary to the proofs, to impute all his payments to his notes. We hold, therefore, that the payments must be imputed to the accounts between the parties, except in so far as the facts and circumstances indicate expressly a different intention; for we think the payments were to be so imputed, by the tacit agreement of the parties, as disclosed by

McLear &amp; Kendall vs. Succession of Hunsicker.

their dealings and correspondence referred to. The first note for \$821 we think has been extinguished by payment and merger into account. The note for \$510 is entitled to a credit of \$250, of date say July 15th, 1872, and to the other note for \$899, being oldest, we will impute the payments of \$150 of date March 17th, 1873, and \$100 of date March 24th, 1873—reserving plaintiffs' rights to claim any amounts that may be due on open or book account by suit hereafter.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended so as to read as follows: "That plaintiffs, McLear & Kendall, do have and recover of the succession of Jay L. Hunsicker, deceased, the sum of (\$899) eight hundred and ninety-nine dollars, with eight per cent interest thereon from fifteenth day of March, 1869, subject to credits of (\$150) one hundred and fifty dollars, as of date 17th March, 1873, and of one hundred dollars, as of date 24th March, 1873. That they also recover the further sum of five hundred and ten dollars with six per cent interest from 14th June, 1872, subject to a credit of two hundred and fifty dollars, as of date July 15th, 1872. That they also recover the further sum of five hundred dollars with six per cent interest from 10th day of March, 1873, together with all costs of suit. And it is further ordered that plaintiffs' right to sue for any amount due them on "book account" be reserved, and that defendant pay the costs of this appeal.

Rehearing refused.

No. 809.

R. G. COBB, CURATOR, vs. T. P. RICHARDSON, SHERIFF, ET AL.

A valid and legal decree of a parish court can not be arrested at the instance of the judgment debtor, by an injunction issuing from any other court.

The clerk of the parish court in which a succession is being administered has authority to issue a *fi. fa.* for the seizure and sale of any property of the succession, previously sold on a twelve-months bond, and not paid for, without regard to its value.

On the dissolution of an injunction issued at the instance of a *curator ad hoc*, damages will not be allowed against the absent plaintiff; nor against the curator representing him, when it appears that the curator acted conscientiously.

**A** PPEAL from the Fourteenth Judicial District Court. *Parsons, J.*

*Cobb & Gunby* for plaintiff and appellant.

*R. W. & R. Richardson* for defendants and appellees.

The opinion of the court was delivered by

SPENCER, J. Under an order and decree of the parish court of Ouachita, rendered on application of the administratrix of the estate of Bofenschen, a house and lot (with other property) of said estate was



sold, on second offering, at twelve-months credit, for \$830, to D. F. Conover & Co., who, conformably to law, executed their twelve-months bond therefor, with R. G. Cobb and A. A. Gunby as sureties, and with special mortgage on the property.

The administratrix rendered her account and tableau of said estate, carrying thereon one T. N. Conor as a creditor paid by her to amount of \$831 17; and charges herself with the proceeds of the sales of the property as cash. This account and tableau were duly homologated.

Said bond not being paid, execution was issued thereon by the parish court, on December 10th, 1877. The principals on said bond being absentees, R. G. Cobb, one of their original attorneys, was appointed curator *ad hoc* and attorney, to represent them in the executory proceeding on the bond. The sheriff, under the *fi. fa.*, seized and advertised the mortgaged property, and gave the notices required to the curator. On the day of sale R. G. Cobb, curator of Conover & Co., applied to the district court and obtained an injunction against this proceeding on the following grounds:

1. The parish court issuing the writ is without jurisdiction *ratione materiæ*, the amount of the writ and the value of the property sought to be sold being over \$500.

2. That the succession of Bofenschen had been settled anterior to the issuance of the writ, the administratrix discharged, and no succession existed in which an order could be issued by the parish court.

3. The parish court had no power or jurisdiction to appoint a *curator ad hoc* in a proceeding against D. F. Conover & Co.

4. That the parish court had no power to order the issuance of an execution on a twelve-months bond for an amount exceeding \$500, and that the document upon which the writ enjoined was issued in this case was not a twelve-months bond as contemplated by Articles 719 and 720 C. P.

5. That there was no such proceeding on the docket of either the parish or district court of Ouachita, or other court, entitled estate of C. L. B. Bofenschen vs. D. F. Conover & Co. et al., and no writ of *fi. facias* can issue without the existence of such suit or proceeding, and on a judgment therein.

He prays for citation of the sheriff, of the legal representative of said estate, or other person claiming ownership of said bond. The sheriff, the administratrix, and T. N. Conor (to which last it seems said bond had been transferred in satisfaction of his judgment and claim against the estate of Bofenschen) appeared, and moved to dismiss the injunction with damages, for the reason that the district court had no jurisdiction, and was without authority to enjoin an execution issued by the parish court. This motion was sustained, the injunction dissolved, and

suit dismissed without damages. Plaintiffs appeal, and defendants have prayed for an amendment of judgment as to damages.

If the writ was issued in this case by the parish court, under a *legal* and *valid* decree of that court, it is clear that *the defendant in said writ* can not enjoin it in any other court, whatever might be the rights of a third person, not connected with the writ, to do so. C. P. 617, 639 ; 11 A. 525 ; 4 R. 57 ; 12 R. 531 ; 18 A. 339.

There can be no doubt of the jurisdiction and authority of the parish court to decree and direct the probate sale of the property of successions; Constitution, Art. 87. Article 990 of the Code of Practice prescribes the mode and manner of executing these decrees, by directing that if on first offering the property does not sell, it shall be re-offered for what it will bring on twelve-months credit ; " provided, however, \* \* \* the purchaser shall give a twelve-months bond, \* \* \* such bond to have force and effect as a twelve-months' bond taken in sales under writs of *feri facias*, and the collection of such twelve-months bonds shall be enforced in the same manner as twelve-months bonds taken under Arts. 719 and 720 C. P. upon execution issued upon such twelve-months bonds by the clerk of the court which issued the order for sale of the property, and such clerks are hereby authorized and required to issue such executions on the demand of any person having legal right to control such bond."

It is manifest, therefore, that the bond in question was taken in strict conformity to law, and in execution of a lawful, valid, and constitutional decree of the parish court. The taking of said bond was but one step, one link, in the process of carrying into execution the said decree—just as the issuance of the commission to sell, the advertisement, the sale, were so many successive acts in execution of it. It was not, and is not, fully executed until the money is realized ; for to sell a thing is to exchange it for money. So the execution issued on that bond is but another and further act in execution of the original decree of sale rendered by the parish court ; and that court, being the court which rendered the decree, was the only court that could issue the process necessary to its execution. C. P. 617, 639 ; 11 A. 525.

If that court had jurisdiction and authority to render the decree, it necessarily had the authority to execute it, as an incident, and regardless of the question of amount, just as if, in the settlement of the accounts of an administrator, tutor, or executor, it should decree him indebted to the estate for more than \$500, it could issue process to enforce its payment, or do any other act to make effective its orders. See 29 A. 506 ; *Tertrou vs. Durand*.

Taking execution on this twelve-months bond is not the institution of a suit, and has none of the characteristics of a suit. It is simply the

ultimate execution of the decree directing the sale, the reduction into money of the property of the estate; and it is not true to argue as do plaintiffs counsel "that there is no judgment," which serves as a basis for this bond and the *fi. fa.* issued thereon.

The exception or motion of defendants was not to dismiss on the face of the papers. It was that the court was without jurisdiction, that the *fi. fa.* enjoined had issued from the parish court, and that the district court had no authority to enjoin it. On trial of this motion or exception evidence was properly offered and admitted to show the truth of these allegations.

Holding the views we do, there can be no question of the right of the clerk to issue the *fi. fa.* In fact, Article 990 C. P. expressly provides that it shall be issued "by the clerk of *the court which issued the orders for sale of the property.*"

The defendant has asked us to amend the judgment, by allowing the highest rate of damages, but we do not think it would be proper to do so. The plaintiffs are represented here, and appear, only by a curator *ad hoc*, who was, we think, properly appointed to represent the absent defendants in execution. We can not inflict damages on R. G. Cobb personally, because he is not plaintiff in injunction, and besides we are not disposed to hold to personal responsibility officers of court who we must presume are without interest and acting conscientiously.

The judgment appealed from is affirmed, at costs of appellant in both courts.

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#### ON APPLICATION FOR REHEARING.

The defendants ask a rehearing of this cause on the question of damages.

We have carefully reconsidered the views expressed by us in our opinion in this case, and see no reason to change them.

We have grave doubts as to the authority of a *curator ad hoc*, as such, to take out an injunction for and in the name of an absentee. He is not under bond for his faithful administration of the particular affair with which he is charged; and to hold the absentee or his property bound for damages resulting from the illegal acts of one who, in reality, has no mission or authority derived from him whom he represents, and who is not under bond to indemnify his principal, would be, we think, going further than our courts have ever gone. It has been held that a minor can not be held liable in damages for the tortious suing out of an injunction in his name by the tutor.

But it does not follow that because the damages can not be recovered

of the minor or absentee in such cases that the injured party is without remedy, for he would have his separate action in damages against the wrongdoer, and perhaps against his sureties. But, as we said, this redress can not be had in the injunction suit, for the party is not before the court in his individual capacity.

The rehearing is refused.

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No. 789.

LOLA BLANTON VS. JOHN T. LUDELING ET AL.

The alleged owner of property which has been sold at a tax-sale can not maintain an action for its recovery, until he has tendered to the purchaser at the tax-sale the price paid by the latter, and which was applied to the payment of the taxes and costs due by the owner.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*Cobb & Gunby* for plaintiff and appellee.

*John T. Ludeling* and *John H. Dinkgrave* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. The object of this suit is to have rescinded certain tax sales and the tax titles, under which defendants hold the land in controversy, and to have plaintiff declared to be the owner.

Plaintiff claims title under a deed, under private signature, the consideration of which is ten dollars, made by the assignee in bankruptcy of O. M. and W. C. Blanton, of the State of Mississippi, one of whom is the father, the other is the uncle of plaintiff. One of them was adjudicated a bankrupt, on a petition filed 28th February, 1868, the other on a petition filed 14th December, 1868. The deed to Lola Blanton was dated 20th October, 1875.

The tax sales under which Ludeling purchased, and defendants claim, were on the 7th March, 1868, for Parish and State taxes, and on 16th May, 1868, for State taxes, due by the heirs of John Blanton, under whom plaintiff derives title.

Several exceptions were filed by defendants, one of which is fatal to this action; and that is: "That no offer or tender has been made to the said Ludeling of the amounts paid by him at the tax sales at which it is alleged in the petition he acquired titles, and which sums were applied to the payment of the taxes and costs due by the owner or owners of said lands; and that this is a condition precedent to the institution of a suit like the present."

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Blanton vs. Ludeling.

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We incline to the opinion that ten dollars can not be regarded as a serious price for a tract of land such as that claimed by plaintiff, containing 335 acres. We very much question the right of an assignee in bankruptcy to dispose of the property of the bankrupts at private sale, without a previous order of the court. We think that, at the time this sale purports to have been made, in October, 1875, about six years after the right of action accrued to the assignee, he had no available right or claim against defendant's claiming and holding adversely; and that his deed to plaintiff vested no greater right in her than the assignee himself had.

We think it proper also to premise, that the surrender in bankruptcy by one of the Blantons a few days before the first tax sale, and of the other Blanton several months after the last tax sale, were no obstacle to the sales. The twenty-eighth section of the Bankrupt Act, last clause, is as follows: "*Always provided: That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.*"

We think that when Bolton was appointed assignee of O. M. Blanton, on the 17th November, 1868, and of W. C. Blanton, on the 19th April, 1869, the title of the bankrupts to the property in question had been, apparently and *prima facie*, divested by the tax sales made in March and May, 1868, which the State of Louisiana, in the exercise of her sovereign power, had a right to make, without regard to the bankruptcy of the owners; and all that was left to their assignee was the right of redemption within the time and on the terms prescribed by the laws of the State; or, at his option, a right of action to recover the property for illegality in the tax sales, a right which was barred absolutely by the lapse of two years. We prefer, however, to place our decision upon the exception alone, which is no longer an open question.

In *Daquin vs. Coiron*, 6 N. S. 684, it was declared to be settled jurisprudence that where the property of minors was sold to pay debts of their ancestors, from whom they derived, they can not recover on the ground of informality in the proceedings, without repaying the money which has been applied to their benefit.

This doctrine has been recognized and enforced in numerous cases, in which it was decided that the offer to return the consideration received is a condition precedent to the right of action to rescind a sale or a contract. *Janin vs. Franklin*, 4 La. 198; *Bassett vs. Ballard*, 19 La. 281; *Stockton vs. Downey*, 6 A. 581; *Chambers vs. Wortham*, 7 A. 113.

In *Brown vs. Bouny*, 30 A. 174, the mortgagor died, and the mortgagee proceeded *via executiva*, in ignorance of her death. The sale, the whole proceeding, was void; but the money was applied to the payment of the mortgage debt. The heir of the mortgagor sued to recover

## Blanton vs. Ludeling.

the property. This court recognized the doctrine as announced in *Coiron vs. Daquin*, and the subsequent cases cited above, and said: "No court, under the facts disclosed by this record, would give the plaintiff this property, without first requiring him to make restitution; and when this want of restitution or offer of restitution was set up, by way of exception, the court properly maintained it."

In *Barrow vs. Lapène*, 30 A. 310, this doctrine is again and fully recognized. Plaintiff sued to recover his property sold for taxes; and he alleged that no taxes were due, because he had paid them himself. The exceptions were want of tender, and no cause of action. No proof was offered on the trial of these exceptions, and this court decided that the exceptions were not well taken, because there was nothing in the record to show that defendant was entitled to re-imbursement.

The amount of taxes paid by Ludeling, in this case, appears by the tax deeds and other evidence in the cause. These taxes were a lien on the land, binding the owners, and those claiming under them; and the restitution of this amount, or the offer to restore was a condition precedent to the right of action to annul the tax titles, and to recover the property. The district judge erred, therefore, in not maintaining this exception, and dismissing the suit.

The judgment appealed from is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the exception number three, of want of tender or offer to return to Ludeling the amount paid by him at the tax sales of the land in controversy, be maintained, and that this suit be dismissed, plaintiff and appellee paying the costs in this court and in the district court.

Rehearing refused.

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 No. 795.

## JUREY &amp; GILLIS VS. HUGH ALLISON &amp; Co. AND SHERIFF.

Tax titles which are not mere simulations can not be attacked collaterally. They are presumed to be valid until annulled in and by a revocatory action.

**A** PPEAL from the Twelfth Judicial District Court. *Smith, J.*

*S. L. Elam and C. J. Boatner* for plaintiffs and appellants.

*H. P. Wells* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. Hugh Allison & Co., judgment creditors of one Hair, with a recognized mortgage upon his land, issued execution, under which the sheriff seized the land, and advertised it for sale. The plaintiffs

injoined, claiming title under a tax deed, confirmed by another deed, more than six months thereafter, from the Auditor. The judgment of Allison & Co. was obtained in December 1874. The deed of the tax collector to Jurey & Gillis is dated the ensuing month, and the confirmatory title of the Auditor in August 1875. The writ of *feri facias* of Allison issued in 1877, and was enjoined in March of that year.

The defendants pleaded the general issue, and in special defence, aver that the tax title from the collector to the plaintiffs is a simulation—that no sale was made on the 6th of January as that deed recites—that the deed was not executed on that day, or in the presence of the witnesses whose names appear upon it, but in New Orleans, and at a subsequent time—that Hair remained in possession of the land, living on it as heretofore.

The plaintiffs excepted, and moved to strike from the answer all that portion that charged informalities and irregularities in the title, and the acts of the officer which preceded it. This was refused, but leave was reserved to object to the reception of testimony under those allegations. Objection was accordingly made, the testimony was admitted, and a bill was reserved.

The allegation of simulation is that the sale was not a reality—that it was not intended to convey an actual title, but was only a pretence, while the real ownership remained in the party conveying, or in some other person than the party to whom the conveyance was made. It is obvious that the defendants do not mean to plead that the title of the tax collector was of that nature. The substance of their plea is, that the tax title was void because of irregularities of the officer making it, and they can not change its character by misnaming it. It is not a charge of simulation, and therefore the authorities, cited by defendants in support of their right to attack it under such a charge, are not applicable.

The objection of the plaintiffs to the testimony was that a tax title, like a sheriff's title, can not be disregarded, and the property conveyed by it can not be seized by a judgment or mortgage creditor of the former owner, until he has first successfully attacked the deed in a direct action for its revocation. This was held to be good law in *Lannes v. Work Bank*, 29 Annual, 112. Since the present Constitution has been in force, our courts are required to consider tax titles as *prima facie* valid. They are placed on the same footing as titles acquired at judicial sales, and are now subject to the same rules as sheriff's deeds. Until annulled in and by the revocatory action, they are presumed to be valid.

The title of the tax collector was confirmed by the Auditor in August 1875, more than six months having intervened since the date of the first deed. The plaintiffs leased the property to Mrs. Hair for 1876, and were

therefore apparently in possession under their title—were really so, if the lease was a verity. Being in possession of the land under the deed of the tax collector, and the confirmatory title of the Auditor, the seizure of the land under the process of the defendants was unlawful, and the injunction prohibiting its sale was rightly issued.

The judgment of the lower court dissolved the injunction. We shall reverse it.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the injunction is perpetuated, reserving to the defendants the right to attack the title of the plaintiffs in a direct action. It is further adjudged and decreed that the plaintiffs' demand for damages is disallowed, and that they recover of the defendants their costs in both courts.

Rehearing refused.

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No. 815.

ELIZA SNIDER ET AL. VS. W. N. COLLINS, SHERIFF, ET AL.

An appellant in whose favor a certain sum of money has been awarded by the judgment of the lower court, may at any moment abandon his appeal, and enforce the judgment appealed from.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J.*

*J. D. Watkins* for plaintiff and appellant.

*Watkins & McDonald* for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. In October 1877, Eliza Snider obtained, in her own and her children's names, a judgment in which they are recognized as the owners of certain lands then in possession of one M. C. Smith. In and by the same judgment, the said Smith was allowed the sum of eleven hundred dollars for the buildings which he had placed on said lands.

From that decree, Eliza Snider et als. did not appeal, but N. C. Smith, and John C. Loze, called in warranty by him, did; and—under the order granted to that effect—they each filed a bond in the amount fixed for a suspensive appeal.

After the filing of the bonds, Smith transferred to Loze the judgment rendered in his favor, in October 1877, and—on the 24th of January 1878—the transferee caused execution to issue on said judgment. In so doing, he expressly renounced to, and abandoned the appeal taken by him and that taken by Smith.

On the 27th of February 1878, Eliza Snider filed a petition in which she prayed that the writ of *fi. fa.* issued for the benefit of Loze be



enjoined and annulled. No injunction was ordered, and—we presume—because she had herself abandoned the purpose of enjoining the execution of the writ.

Acting under that writ, the sheriff seized the land of which Smith had been evicted and the improvements which he had built thereon. A notice of that seizure was served on a curator *ad hoc* appointed to Eliza Snider, and, on the 16th of March last, after advertisement and appraisal, the lands and improvements were adjudicated to John C. Loze & Co for three hundred and fifty dollars.

As we have already said, Eliza Snider's petition for an injunction was filed on the 27th of February. Her demand was based on the grounds:

1. That—as soon as the appeal bonds were filed—the jurisdiction of the district court ceased and that of this court attached.
2. That—without first withdrawing the appeals taken—no execution could legally issue on the judgment appealed from.

We have found, in the transcript, a document in these words: "Plaintiff—Eliza Snider—prays that the judgment rendered in favor of M. C. Smith and against her, in the original suit, for \$1100 for improvements, be decreed satisfied etc."

This document does not appear to have been filed. Not a single word in the petition of the 27th of February suggests the satisfaction of said judgment, and that document—which may have been improperly transcribed in the record—is foreign to and disconnected from any issue raised in plaintiff's pleadings.

The authorities relied upon by plaintiff are not applicable to the state of facts presented in this case. We admit "that, when the Supreme Court has once acquired jurisdiction of an appeal, it can not permit the appellant to withdraw his appeal, without the consent of an already cited appellee:" but it has never been held that one can not—after he has taken an appeal from a judgment—renounce to and abandon his appeal, and acquiesce in and execute the judgment.

In such a case, what is the appellee's right? "He may obtain a copy of the record, bring it up to the appellate court, and pray either for judgment, or for the dismissal of the appeal." In this instance, plaintiff has exercised that right.

C. P. 588, 589, 590.

In *Savoie vs Thibodeau*, we said that a party has the right to abandon his appeal, acquiesce in the judgment appealed from at any time, and enforce it. That view, we still consider as correct. 29 A. 52.

Had the document, in which plaintiff alleges that the judgment transferred by Smith to Loze has been satisfied, been embodied in the prayer of her petition and formed a part of it: had that prayer been

preceded by the reasons given in the brief as to how and when that judgment was extinguished, and that is by confusion, that defence would not have been supported by the evidence adduced on the trial. That evidence shows that a judgment obtained by Smith against Eliza Snider et als, was—by Smith—transferred to Loze, and executed by the latter. That transfer neither did nor could extinguish plaintiff's liability under said judgment.

From the answer filed in this Court, we presume that the claim for damages, urged by defendants in the lower court, has been abandoned. The fact that no injunction was ordered, has—it is probable—induced the defendants to abandon that claim.

No cause has been alleged, much less proven, which would have justified the granting of the injunction applied for, or authorized the granting of the execution issued at the request of Loze.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

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No. 848.

JOHN A. HAYNES vs. J. B. O'NEIL, SHERIFF, ET AL.

A judgment debtor against whom a final judgment has been rendered, can not enjoin the execution of the judgment on the ground that the mortgage on which the judgment was based had perempted before the judgment was rendered. As to him, the question of peremption is *res adjudicata*.

**A**PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J.*

*J. D. Watkins* for plaintiff and appellant.

*J. A. Snider* and *L. M. Nutt* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. On January 14, 1867, John Pickett sold two hundred and seven acres of land to Pierce M. Butler and Andrew P. Butler for ten thousand three hundred and seventy-five dollars payable in gold coin, one fourth of which was paid cash, and for the residue three notes of equal sums were given, payable in one, two, and three years from date, with interest. The payment of these notes was secured by the vendor's lien, and by a special mortgage which was recorded in the proper book January 17th. 1867.

One of these notes was subsequently acquired by M'Calla, another by Preston, and the third by J. B. Pickett. M'Calla sued on his note, and obtained judgment against the Butlers, with recognition of the mortgage on March 27, 1868. Afterwards Pierce Butler conveyed his

undivided half of the land to the holders of the notes in payment of his part of the unpaid purchase price. Andrew Butler went into bankruptcy, and his interest in the land was sold by Norton, assignee, to Haynes in June 1870 for six hundred dollars.

On January 7, 1874 the three holders of the notes then brought suit against Haynes to resolve the sale, and judgment was rendered in their favour in April, 1876. The pleadings were changed during the trial, but we omit the detail of that case, because it is accessible to the profession. *Vide* Pickett v. Haynes, 28 Annual, 844, from which it will be seen that this Court affirmed the judgment of the District court in July 1876, and on a writ of error to the Supreme Court of the United States, this court's judgment was affirmed March 13 1877. The judgment thus affirmed was that Haynes "shall pay to said plaintiff within six months from the date of this judgment the sum of three thousand eight hundred and ninety dollars and ninety cents in gold coin of the United States, and eight per centum per annum interest thereon from the 14th. of January 1867, and all costs of suit, and in default of such payment by said defendant Haynes, it is further ordered that he shall surrender to be sold for satisfaction of plaintiff's mortgage the undivided one half interest in the tract of land described in plaintiff's petition as the whole of (here follows the description.) It is farther ordered, adjudged, and decreed that plaintiffs' special mortgage and vendor's privilege upon this tract of land be recognized, foreclosed, and enforced for the amount of this judgment, if said sum of money be not paid to plaintiffs by Haynes the defendant within six months from this date." The date is April 1, 1876. The appeal of Haynes was suspensive.

The mandate of the Supreme Court of the United States, remanding the case for execution to the State tribunals, bears date June 25, 1877. The certified copy thereof issued from this court, with copy of its judgment, August 1, 1877, and on the seventh of that month, an execution issued from the District Court of Bossier to enforce it.

Meanwhile the mortgage had perempted. Ten years from its inscription had expired the previous January, *i. e.* on Jan'y. 17, 1877.

The writ of *feri facias* having gone into the sheriff's hands, Haynes enjoined its execution upon the ground that he had bought the M'Calla judgment, and that the mortgage had perempted, in consequence of which the other plaintiffs in the suit against him had lost their mortgage upon the land. That is the present suit, and the writ of injunction bearing date September 26, 1877.

The answer specially denies Haynes' purchase or ownership of the M'Calla judgment, and it turned out that he did not own it, and pleads the judgment in Pickett v. Haynes, which we here quoted at length, as *res adjudicata*. In further defence it is pleaded that if the mortgage of

January 1867, which was recognized by the judgment of April 1876, had perempted in January 1877, which is denied, that such peremption does not affect the judgment of 1876, upon which the *fi. fa.* that is injoined, issued. When this answer was filed does not appear, the clerk having failed to copy in the transcript the filing of any of the papers.

The case was tried at the March term 1878. On the 28th. of that month the plaintiff pleaded prescription to the M'Calla judgment. Ten years had expired on the day before, viz March 27th. and it had never been revived. The plaintiff had based his injunction partly on his alleged ownership of this judgment, and on proof that his claim to it was without foundation, then attacked it with the plea of prescription.

Thus it will be seen that the plaintiff's right to arrest the sale is based upon the alleged peremption of the mortgage, and the alleged prescription of the judgment upon a part of the mortgage debt. The defendant argues that the mortgage did not preempt—that as to Haynes, no reinscription was necessary because he had prevented its foreclosure by contesting the suit of the holders of the mortgage notes having that foreclosure for its object—that he had appealed suspensively from the judgment, ordering the foreclosure, and the time had meanwhile expired—that the prescription of the M'Calla judgment had been acquired *pendente lite*, and was completed and pleaded on the eve of the trial of this injunction suit, the judgment in which was signed March 30, 1878.

These are interesting questions, but they are not vital to this cause. Whatever may have been the rights lost by this lapse of time, the parties here are concluded by a judgment rendered between them in June 1876, whereby Haynes was decreed to pay the plaintiffs in that suit (defendants in this) a specified sum of money, with the faculty of relieving himself of that obligation by delivering up a specified thing. That this judgment was personal as to him—that it bound him by its terms to that payment—and that it could be discharged only by payment, or by surrendering the land, is very clearly expressed.

It must be observed that we are not concerned with the regularity of the pleadings in that cause, nor the rightfulness of that judgment. Its sanction by three courts leaves nothing for us to do but to examine its terms, and ascertain what the present plaintiff is condemned to do. There are no third parties whose rights are even remotely affected by the failure to reinscribe the mortgage, or to revive the judgment. In a legal contest between the only parties who pretend to have any interest in, or rights upon the land, which contest was an attempt to enforce those rights on the one part, which was resisted on the other part, an adjudication was had resulting in a judgment, which is binding on both, and that is the judgment, the execution of which has been delayed and prevented by this plaintiff's injunction. Grant that the mortgage of Janu-

ary 1867 has perempted. The judgment of June 1876 has not been satisfied. Grant that the M'Calla judgment has not been revived. The judgment of these defendants is still in force.

Prescription was pleaded in this court to the mortgage notes. They had been merged in the judgment. The judgment enjoined by this proceeding is the one in which they are merged. The plea is not good.

The plaintiff's prolonged efforts to get rid of the mortgage which secured the purchase price of the land are all abortive. Legally, his pretensions are unsupported. Equitably, he presents no claim worthy of consideration. The judgment of the lower Court dissolved the injunction with damages.

The judgment is affirmed.

Rehearing refused.

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No. 845.

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STATE OF LOUISIANA VS. DANIEL MONROE.

The charge in an information that the accused was guilty of the larceny of "the sum of twenty-six dollars in current money of the United States of the value of \$26," is sufficiently certain, and descriptive, to warrant a conviction.

**A** PPEAL from the Parish Court of Madison. *Dennis, J.*

*George J. Bradfeet and W. N. Potts, District Attorney, for the State.  
Isaac Crawford for defendant and appellant.*

The opinion of the court on the original hearing was delivered by EGAN, J., and on the rehearing by MANNING, C. J.

EGAN, J. The accused was tried, found guilty, and sentenced to the Penitentiary under an information filed under section 810 of the Revised Statutes of 1870 which charged him with the larceny of "*the sum of twenty-six dollars in current money of the United States of the value of \$26.*" The statute provides that "the robbery or larceny of bank notes, obligations or bonds, bills obligatory, or bills of exchange, promissory notes for the payment of any specific property, paper bills of credit, certificates granted by or under the authority of this State, or of the United States, or any of them, shall be punished in the same manner as robbery or larceny of goods and chattels:" *i. e.* by imprisonment at hard labor or otherwise not exceeding two years. The case comes before us on a bill of exceptions (of which it is only necessary to say it was not well taken, the court correctly admitted the testimony for the reason given in the bill); also, on a motion for new trial, in overruling which it seems to us the judge ruled very rigidly, but which, under our view of the case, need not be further noticed; and on a motion in arrest of judg-

ment, of which it is only necessary to notice one ground ; that is in substance that the words "current money of the United States," used in the information, without any more minute or particular description of the character or kind of money, is not sufficiently certain to warrant conviction under the information, and does not sufficiently describe any thing named or described in the statute, and that there is no such thing under our law as the larceny of current money of the United States.

Wharton's Am. Crim. Law, vol. 1, sec. 363, says : "Money is described as so many pieces of the current gold or silver coin of the realm called —. The species of coin must be specified," and, again, "a count charging the conversion of \$19,000 of money, and \$19,000 of bank notes, is bad for uncertainty." The same author, sec. 347, says, under the general term "money" bank notes, promissory notes, or treasury warrants can not be included. Again, sec. 346 : "In England, in an indictment under 2 Geo. 2, c. 25, the instrument stolen must be expressly averred to be a bank-note, or a bill of exchange, or some other of the securities specified, and, therefore, it is insufficient to charge the defendant with stealing a note commonly called a bank-note, for none such is described in the act." The same author says, sec. 364, *et seq.* : "It is generally sufficient, and always necessary, to use the words of the statute. It is not absolutely necessary under our own law to use the precise words of the statute always, but it is safest to do so in charging a statutory offense, and in all cases it must be done substantially." In the State vs. Edson, 10 A. 229, it was held that an indictment charging the embezzlement of a lot of lumber, or a certain lot of furniture, was bad for uncertainty of description of the articles embezzled. In the State vs. Cason, 20 A. 48, an indictment was held bad, and the judgment arrested when the charge was larceny of goods and lawful money of the United States (commonly called greenbacks), of the value of twenty-four dollars and twenty-five cents ; a much more minute description than that in the present case. The court says no such effects or notes as greenbacks are known to law, but treasury notes of the United States are recognized by the laws of Congress, and cites 5 A. 326 ; 10 A. 191, 207 ; 11 A. 648. In the State vs. Muster, 21 A., an indictment for the embezzlement of "the sum of eleven dollars" was held bad. The court said the indictment does not inform us whether the sum embezzled consisted of gold or silver dollars, or of currency ; whether of two or more coins, or treasury notes, or bank-bills. It is not always necessary, under the statute, to set forth a minute or detailed description of the thing stolen, but it is necessary so to designate it as to make the charge intelligible, and to bring it within the statute we have already recited. The description of the thing stolen does not conform, either in language or substance, to any thing named or described in the statute ; nor is the language "cur-

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State vs. Monroe.

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rent money of the United States" sufficient designation of the thing stolen. The motion in arrest of judgment must be sustained on the ground heretofore discussed.

It is therefore ordered that the judgment and sentence appealed from be and it is arrested and set aside; that the information be quashed as defective in law, and that the accused be held to answer such lawful charge as may be preferred against him under the orders of the court *a qua*.

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ON APPLICATION FOR REHEARING.

MANNING, C. J. An application for a rehearing has been made, and we grant it.

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ON REHEARING.

We are satisfied that our decision in this cause is wrong, because of a special statute relative to the structure of indictments for the larceny or embezzlement of money.

Under the common law, great particularity was required in laying the charge when money was the object that was stolen. The species of coin, or the kind and denomination of the bank-note, had to be set out with descriptive particularity. Our former opinion followed the common-law authorities in requiring a rigid compliance with these (formerly) essentials. There was also error in stating the prosecution was for the offence, denounced in sec. 810, Rev. Stats. 1870. The prosecution was under sec. 812 as well as the other.

The important matter however is the provision that, in every indictment in which it shall be necessary to make any averment as to any money or any bank-note, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved &c. Rev. Stats. sec. 1061.

A statute, mitigating the rigour of the common-law requirements was commented on in the *State v. Edson*, 10 Annual, 229, where the court said—in ruling that the words, 'lot of lumber' were insufficient description of the thing stolen—"there is one exception to this general rule contained in Stat. 1845, sec. 3 which declares that in prosecutions for larceny or embezzlements of bank-notes, etc. \* \* \* gold or silver money, or any other property of that kind, it shall not be necessary

to set forth in the indictment a detailed description thereof, but a general allegation of the amount or amounts, \* \* \* shall be sufficient."

One provision of sec. 1061 of the last revisal is specially for prosecutions, wherein any averment whatever touching money or bank-notes is necessary, in which cases not only is a description of them as money sufficient, but the proof need be only of any amount of coin or of any bank-note, even though the coin or bank-note proved be not of the particular species, or the particular nature, which was charged.

The law of 1845 dispensed with the detailed description which the common law deemed so essential, and the present law dispenses with any other description than merely, money—and goes farther, by dispensing with proof of the particular kind of money charged, and enacts that proof of any kind shall support the indictment.

The defendant was properly convicted. Therefore

It is ordered and decreed that our former judgment is set aside and avoided, and that the judgment of the lower court is affirmed.

No. 821.

THE PARISH OF LINCOLN VS. J. G. HUEY.

This court has jurisdiction of all suits which involve the legality of a tax, without regard to the amount in dispute.

Before a parish can recover the amount of a tax imposed by its police jury, it must show that an estimate of the parish expenses for the current year was made, and published at least thirty days before the assessment of the tax.

**A** PPEAL from the Parish Court of Lincoln. *Redwin, J.*

*S. D. Pearce and Thos. A. Garrett* for plaintiff and appellee.

*Ellis & Killgroves and J. E. Trimble* for defendant and appellant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to recover five hundred dollars, half of the annual tax imposed by its police jury upon every keeper of a grog-shop. The tax was for 1876, and the ordinance provided that persons opening shops after the first of July should pay only half of the tax of that year. The defendant opened his shop during the last half of the year. The tax imposed by the ordinance was one thousand dollars.

The payment of the tax is resisted on the grounds, 1. that the police jury failed to publish its estimate of the parish expenses for the year, before fixing the rate of taxation; 2, that the imposition of so large a sum for a license to retail spirituous liquors was virtually a prohibition.

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The case comes up upon a statement of facts made by the judge, the counsel of the parties having failed to agree on one. Code of Prac. art. 602-3.

There was an appeal to the District court, which was properly dismissed, and this second appeal was taken direct from the parish court to this court. Our jurisdiction attaches by the reason of the question involved—the legality of the tax—without regard to the amount.

The powers conferred upon police juries relative to the licensing of drinking saloons are very ample. There is however a restriction upon the power of police juries to lay taxes of any kind, the application of which is invoked here. Before a police jury can lawfully fix and decide on the amount of taxes to be assessed for a current year, it must cause an estimate of the parish expenses to be made, and published at least thirty days before it decides on the amount of taxes to be raised. *Ibid.* sec. 2745.

The plaintiff insists that this was done. The judge's statement is, the estimate of the expenses of 1876 was made in January of that year, and published in the 'Vienna Sentinel', a weekly newspaper published in Vienna, and which was the official paper of the parish, and this estimate appeared in one issue of that paper.

For aught that appears here, the issue of the newspaper in which the estimate was published was of date only the day before the meeting of the jury which fixed the amount of taxes to be assessed. The estimate appeared in one issue, but was that number of the paper issued thirty days before that meeting of the jury? It seems extraordinary, that when a police jury has an official journal, a file of which is or ought to be kept in one of the offices of the court, and should be preserved by the clerk of the police jury as a part of the parish archives, it should not be produced in evidence in a case where the parish authorities were so much interested as in this. There is no proof that there was any publication of the estimate of parish expenses thirty days before the amount of taxes was fixed, much less that such publication was made in each issue of the weekly newspaper during thirty days, if that be requisite.

It is a wise law that requires the taxpayers to be advertised of the intention of a police jury to assess a certain sum upon them, and their property—to fix an aggregate amount to be raised by taxation in any given year. It advises them of the quantum and objects of burthens that are about to be imposed upon them for parochial purposes, and gives them an opportunity to exercise a healthful restraining influence upon their local legislature. We are not disposed to relax the rule which has been imposed upon the police jury, even if we had the power.

The imposition of the tax in this case is illegal because the estimate of the parish expenses was not duly published. There is no present

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Parish of Lincoln vs. Huey.

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need of considering the other objection. The plaintiff had judgment in the parish court, from which this appeal is taken. It is erroneous. Therefore

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favor of the defendant against the plaintiff upon its demand, and for costs.

Rehearing refused.

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No. 853.

R. W. DAUGHERTY ET AL. VS. EXECUTRIX OF S. W. VANCE.

One who urges an exception of misnomer must allege, and prove the real christian name, and that done, the party against whom the exception is filed should be permitted to amend at once.

A vendor of a movable who sues the executrix of the vendee, for the dissolution of the sale, and the recovery of the movable, and swears that he fears the defendant will part with, or dispose of the movable, during the pendency of the suit, is entitled to have the property sequestered. In such case he need not allege that he has a privilege on the property.

**A**PPPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J.*

*Land & Taylor* for plaintiffs and appellants.

*J. A. Snider* and *J. D. Watkins* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. The heirs of R. W. Daugherty sue to dissolve, for non-payment of the price, a sale of five mules, made by him to S. W. Vance, whose succession is herein represented by the executrix of his last will. As a protection to their alleged right, they have obtained from the lower court an order commanding the sequestration of the mules which they claim. Their application to have them sequestered is based on the ground of fear that—during the pendency of their suit—defendant may part with or dispose of them, and thereby defeat their right of recovery. It is admitted that plaintiffs' only fear was that the mules might be sold by the executrix under an order of court to pay the debts of Vance's succession.

Defendant's counsel moved to dissolve the sequestration, because:

1. Plaintiffs do not allege that they are the owners of, or that they have a privilege on the mules.

2. Their remedy for the preservation of any rights they may have against defendant, as executrix, on account of said mules, is upon her bond, or by an action to force her to give bond.

Defendant also filed an exception, in which she prays that plaintiffs' suit be dismissed, for the reason that, as required by law, their names

and surnames are not mentioned in their petition. That exception was sustained, the sequestration dissolved, and plaintiffs who—before that dissolution—had offered to amend their original petition by giving their christian names, were allowed to do so after the dissolution.

The exception was improperly sustained : the correct initials of every christian name preceded that of the family, and—in their petition—plaintiffs describe themselves as heirs-at-law of the late R. W. Daugherty, Vance's vendor. This, however, was not in strict accordance with the letter of the law ; but one who urges an exception of misnomer must allege and prove the real christian name, and that done, the party against whom the exception is filed should be permitted to amend *instantly*. 12 L. 9 ; 8 L. 298 ; 12 R. 138 ; 3 A. 139. No such allegation or proof was made by defendant. The second ground relied upon for the dissolution of the sequestration is untenable. Plaintiffs are claiming, not the price of the mules, but the mules themselves, and they were—in no way—interested in compelling the executrix to furnish bond in that capacity. Not only they were not interested in so doing, but—had they pursued that course—their right to pursue it would have been successfully contested.

The second question here presented, is : "Can one who sues to dissolve a sale of personal property, upon which no privilege is *claimed*, sequester that property in the hands of an executrix, because he fears that she will sell it under an order of court, and to pay the debts of the succession upon which she administers" ?

Plaintiffs' action is founded on articles 2561 (2539) 2564 (2542) of the Civil Code, which provides :

The first that, "if the buyer does not pay the price, the seller may sue for the dissolution of the sale."

The other that, "in matters of sale of movable effects, the dissolution of the sale shall take place of right, if demanded, without its being in the power of the Judge to grant any delay, except that fixed by law."

What is the real object of plaintiffs' action ? To resume the ownership and possession of the things embraced in the sale, the dissolution of which they seek to obtain—and, in such a suit, what would be the effect of a decree in favor of plaintiffs ? Its sole effect would be the dissolution of the violated contract, the recognition of the vendor's title to the unpaid property, and—in this case—the restitution of the mules by the legal representatives of the vendee to the legal representatives of the seller. Such an action—it is manifest—is one in revindication.

In their able and exhaustive argument, defendant's counsel contend that the mandate of sequestration is a harsh remedy, which should not be resorted to against parties who contemplate no wrongful act, or against those whose acknowledged purpose is to strictly follow the law—

and that, in this suit, the allegations of plaintiffs' petition do not conform to any section of article 275 of the Code of Practice and did not justify the issuance of the writ.

Those allegations are that the mules were sold, that the price agreed upon was not paid, that they are entitled to recover said mules and fear that, during the pendency of this suit, the defendant may part with, or dispose of them. The prayer of their petition is that the sale be dissolved "*and the possession and ownership of the mules restored to them.*"

Those allegations do conform to the 8th section of art 275 of the C. P. which is in these words: "A sequestration may be ordered *in all cases*, when one party fears that the other will conceal, part with, or dispose of the movable in his possession, during the pendency of the suit."

Here, as in France, from whence we derive the most of our Code, there is a difference between the dissolution of the sale of an immovable and that of a movable: as to the latter, if demanded, the dissolution takes place of right, without its being in the power of the judge to grant any delay, whilst as to the former he may; and—according to Marcadé—the reason of that difference is that, in the case of the dissolution of the sale of a movable, the vendor is almost invariably in danger of losing the thing and the price, and could not follow the property in the hands of third parties.

Marcadé, vol. 6, p. 288; 12 A. 702.

A sequestration is intended to prevent, not merely a wrongful act, but any act—whatever it may be—the result of which would be to remove the sequestered effect from the possession in which it was at the date of the execution of the writ. The article of the C. P. does not qualify the disposal against which it provides, but commands that the effect claimed shall pass from defendant's possession into that of the sheriff and be there retained to be decreed to him who shall be adjudged entitled to it. C. P. 269.

It is admitted that Vance's succession is largely indebted, and—from that admission—flows the irresistible inference that—as a legal and unavoidable necessity—its personal property must be sold, and—inasmuch as, though no legal disposition of the property in controversy could be made after the institution of a suit to recover it, the order to sell it may be asked from and unadvisedly granted by another court than that in which the controversy is pending, the apprehension that the executrix would attempt to dispose of it, under even an order of court and to pay the debts of the succession, was—in itself the apprehension of a prohibited and probable disposition of the property.

Under these circumstances, this case presents an exception to the general rule invoked by defendant's counsel. Had the plaintiffs allowed

the presumed sale to take place, the right which they now claim would have been practically defeated and lost, and as the vendors' privilege was not recorded, they could not have claimed, by preference, the proceeds of the sales. Had it been otherwise, had that privilege been recorded, it might still have been in their interest—as it was their right—to claim their unpaid property and thus avoid all costs, or to claim the price and risk to see the whole of that price applied to debts outranking theirs. We conclude:

1. That, as defendant's exception did not disclose the christian names of plaintiffs, and as no proof was offered to show what were those names, the proposed amendment as first rejected and afterwards allowed by the Court, was immaterial and unnecessary.

2. That plaintiffs' action is one in revindication, to resume the ownership and possession of the mules, and that they had just cause to apprehend that—during the pendency of this suit—defendant would dispose of them.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, defendant's exception overruled, her motion to dissolve the sequestration denied, the sequestration reinstated, and this case remanded to the lower court to be proceeded with according to the views herein expressed, and according to law.

No. 835.

THE STATE VS. MIKE TILMAN.

Carnal intercourse with a female under twelve years of age, amounts, under the law of Louisiana, to the crime of rape. A girl less than twelve years old is incapable of giving consent.

**A** PPEAL from the Fourth Judicial District Court, parish of Ascension.  
*Duffel, J.*

*F. B. Earhart*, District Attorney, for the State.

*Ed. N. Pugh* for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant was convicted and sentenced for the crime of rape. He has appealed. The only question for our consideration is presented by a bill of exceptions to the charge of the judge that if the jury believe that the prosecutrix was under twelve years of age she was incapable of giving consent. In most of the States the age at which a female is deemed capable of giving consent in cases of rape has been fixed by statute. It is not so, however, in Louisiana. We are, therefore, left to the common law as it existed prior to 1805, and to such other

sources of information as are afforded by the provisions of our law on kindred subjects.

Lord Hale, 1 Hale's P. C., says that all sexual intercourse with a child under twelve years, whether with or without her consent, is rape ; and that the statute of Westminster 1, which reduced all rape to a misdemeanor, referred to that period. Blackstone, vol. 4, p. 212, says, however, that law has generally been held only to extend to infants under ten. Greenleaf, vol. 3, sec. 211, says: "If the female was of tender age, the law conclusively presumes that she did not consent, and this age being not precisely determined in the common law was settled by the statute, 18 Eliz. c. 7, at ten years." In first East's, P. C., it was held that the statute providing for the punishment of persons having carnal knowledge of infants under ten, and reducing the punishment, rather created a new felony, other than rape, at common law, to the definition of which last offense force seems essential. Wharton's Am. Crim. Law, vol. 1, sec. 58, fixes fourteen as the age at which infants are presumed to be able to distinguish between good and evil, though they may be shown to be so much earlier. The same author (sec. 61) says: "An infant under fourteen is *presumed* by law unable to commit rape, and, therefore, it seems can not be guilty of it, and though in other felonies *malitia supplet aetatem* in some cases, yet it means as to this fact the law presumes him impotent as well as wanting in discretion. Nor is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offense. Waterman's Federal Digest, p. 520, sec. 20, is to the same effect, except that evidence in rebuttal of the legal presumption may be received. In same, sec. 23, it is said that a female ceases to be a child and becomes a woman at the age of puberty within the meaning of the statute of Ohio defining the crime of rape. There would seem to be no good reason in law for excusing the criminal under fourteen, both on the ground of incapacity and impotency, and yet holding that a female under the age of puberty is capable of giving consent to carnal connection. In the unsettled state of the law, and amid the conflict of authority, we think the safest rule is to look to its origin and reason. On this subject our own C. C. contains provisions which throw valuable light on the intentions and objects of the law-maker. Art. 34 provides that, as "age forms a distinction between those who have and those who have not sufficient reason and experience to govern themselves, and to be masters of their own conduct ; but, as nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage and forming other engagements." Art. 36 fixes the age of puberty at fourteen for males, and twelve for females ; and art. 92 prohibits minis-

## State vs. Tilman.

ters of the gospel, and magistrates entrusted with the power of celebrating marriages, from marrying any male under the age of fourteen years, and any female under the age of twelve years, under penalty, as to the magistrates, of being removed from office, and as to the minister, of being forever deprived of the right of celebrating marriages. We think the Ohio rule and that contended for by Sir Matthew Hale more in accordance with the reason and policy of the law, and especially of our own law, and, in the absence of any adjudication in this State to the contrary, we think there was no error in the charge complained of.

The verdict and sentence appealed from are therefore affirmed.

## No. 807.

## M. H. LIPPMINS VS. A. McCranie.

When the owner of an immovable is present at a public sale of the same, and tacitly assents to its being sold as the property of another, he is thereby estopped from subsequently disputing the title and possession of the *bona fide* purchaser.

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**A**PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Graham, J.*

*J. S. Young* for plaintiff and appellant.

*John Young* for defendant and warrantor, appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 18th of December, 1861, Homer College sold to one Jeter forty acres of land in the parish of Claiborne, and plaintiff claims that, on the 27th of February, 1863, he bought from Jeter the land which the latter acquired from the College, or one corresponding to it in description, with the only exception that the land which he now claims is represented—in the act of transfer from his vendor to him—as being in Section 20, instead of Section 24, in township 21, Range 7 West.

In 1875, by judgment obtained contradictorily with one D. B. Hays, as attorney *ad hoc* of Jeter, who had left the State, Lippmins procured a correction of the description of the land, and—by that judgment—it was declared located in Section 24 instead of Section 20. Not satisfied with that judicial correction, he procured from Jeter an act of sale of said section. This act, intended and executed to evidence the real contract which had been entered into between the vendor and vendee, on the 27th of February, 1863, was passed in May, 1876.

On the 6th of May 1872, the aforesaid 24th Section was sold by the College to James E. Cobb; in December by Cobb to Daniel Yancey, and—in 1874—by Yancey to Adolphus McCranie, for four hundred dollars cash.

This suit was brought by plaintiff to recover the forty acres of land

twice sold by the College, and the value of its fruits and revenues. Each of the defendant vendees has called his vendor in warranty: McCranie has been recognized as the owner of the land, and—from the decree which recognizes his title—plaintiff has appealed.

Cobb purchased that land at a public sale, a notice of which had been published by the College's agent and had been read by plaintiff, who called on Mr. J. S. Young and told him he was inclined to think that the land advertised for sale by the College was his, &c. He could not, at the trial, positively remember whether he was present when it was offered at auction, but believes he was not. Four witnesses, including the sheriff by whom the sale was cried, swore that he was present at the crying, that he did not then oppose the sale or warn the bystanders that he had a title to the land; and—of those four witnesses—three testified that, on said occasion, the only remark which he made was that he had some rails on the land about to be sold, and reserved the privilege of removing them from it. He, shortly afterwards, removed them and allowed Cobb, from whom defendant's title is derived, to take possession of the land.

His limited reservation at the sale of what he considered as his property, the fact that, up to May 1876, no written act attested the existence of his alleged title to section 24, and that—to his knowledge and in his presence—said property was transferred, acquired and paid for, not only without any opposition on his part, but with at least his tacit assent, preclude him from disputing a title and a possession, which—by exclusively his fault—have passed to others, who have bought and possessed in good faith.

Plaintiff's counsel argues that, whatever his client may have said or done at the sale from the College to Cobb, the last deed from Jeter has passed title to him. That deed was but an acknowledgment that, on the 27th of February 1863, Jeter had sold to plaintiff the land in controversy, and—by that deed—he acquired no right which he does not claim to have had at the date of the sale to Cobb.

In his Treatise on Equity, Judge Story says: "There are cases in which a man may innocently be silent; but in other cases a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what was said or done and had become party to the transaction. Thus, if a man—having a title to an estate, which is offered for sale and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by and being silent will be bound by the sale; and neither he, nor his privies will be at liberty to dispute the validity of the purchase"

1 Story on Equity, 375 § 385.



In *Marsh vs. Smith*, this court held "that if a man stands by and is silent while his own property is sold, and suffers another to become the purchaser, he is estopped from disputing a title thus acquired." The rule of law is well expressed by Lord Denman in the case of *Pickard vs. Sears* (6 Adol. and Ellis, 469), to wit: that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. 5 R. R. 523, 3d R. R. 332.

Plaintiff stood by while his land was offered for sale and sold, merely reserved the right to remove the rails which he had on it, and his action and demand against McCranie were properly dismissed and rejected.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed at plaintiff's costs.

## No. 829.

## THE STATE VS. COOLEY NEWTON ET AL.

30 1253  
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All offenses not capital, may be prosecuted on information.

In an information charging that the defendant did feloniously break into a dwelling-house at night with intent to kill, it is not necessary to charge that he did it "burglariously," or "without being armed," or "without assaulting any person lawfully in the house," or to set forth the name of the person the burglar intended to kill.

**A** PPEAL from the Thirteenth Judicial District Court, parish of East Carroll. *Hough, J.*

*Hiram R. Steele*, District Attorney, for the State.

*Stirling T. Austin* and *W. A. Price* for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted on an information which charged that "he did, with force and arms, in the night-time, and with intent to kill, *feloniously* break and enter the dwelling-house of William Howard."

The questions presented for decision are :

1. Can that offense be prosecuted by information?
2. Is it necessary that the breaking and entering be charged to have been "*burglariously*" as well as "*feloniously*" done, and must the bill contain the negative averments "without being armed," "without assaulting," etc., mentioned in section 851 R. S.?
3. Must the indictment set out the name of the person whom the burglar intended to kill, and aver that such person was then and there lawfully in the house?

First—The charge is under section 851 R. S., and the offense is not capital. It may, therefore, be prosecuted by information. R. S. 977.

Second—The crime of burglary known to our law is statutory. The statute defines it, and we must, therefore, look to the statute to ascertain the essential averments of the indictment.

The 851st section says: "Whoever, with intent to kill \* \* \* shall, in the night-time, break and enter \* \* \* a dwelling-house, without being armed with a dangerous weapon \* \* \* and without committing an assault upon any person lawfully being in such house, \* \* \* on conviction shall be imprisoned at hard labor, etc."

The information charges that the accused "did *feloniously* break, etc.," but does not add "without being armed, and without committing an assault upon any person lawfully being in said house."

We take these words "without being armed, etc.," as being used simply to emphasize the difference between the offense denounced in section 851 and that denounced in section 850. That to charge that one did "break and enter" a dwelling, without adding that he did so "armed with a dangerous weapon," is the same as to say he did so "without being armed." In other words, the absence of allegation that he was armed is equivalent to an averment that he was not armed; and an acquittal or conviction under the charge in this case would be a good bar to a subsequent indictment for the same breaking and entering, with the added averment that he was not armed.

It is urged that it is not sufficient to charge that the act was "*feloniously*" done; that the charge should also be that it was "burglariously" done; and we are referred to the authorities showing that at common law such an averment is necessary in an indictment for burglary. As we have seen, the crime of burglary at common law is not known to us by name, as are "murder," "manslaughter," "rape," "robbery," etc. Our statute itself defines what would at common law be the crime of burglary, and thereby withdraws it from the common-law definitions. It is sufficient to charge in the language of the statute, and that the offense has been committed "*feloniously*," since it is now well settled that it is necessary to charge the commission of all felonies, whether common-law or statutory, as "*feloniously*" done. See Whar. Crim. Law, sec. 399; 29 A. 602.

Third—Under the view we have taken of the uses and purposes of the words "without being armed," "without assaulting any person lawfully in the house, etc.," it can not be necessary in a prosecution under sec. 851 to aver that any one was at the time "lawfully in the house;" for in this section those words are only employed as qualifying the word "assault," and, therefore, where no assault is charged they are not

necessary. We apprehend that under sec. 850 it would be necessary to charge that there was some person lawfully in the house at the time of breaking and entering, for that is one of the conditions upon the existence of which the penalty of death is denounced under that section.

We do not think it necessary under sec. 851 to designate the individual upon whom the offender sought to commit the felonies named in the sections.

We see no error in the sentence and decree appealed from, and they are affirmed.

No. 854.

JOHN B. DURHAM VS. HEIRS OF JOHN B. DAUGHERTY ET AL.

Where a wife alleges in her petition that she is authorized by her husband to bring suit, and no exception is taken in the lower court, the question of her authority will not be considered on appeal.

Where a vendor of real estate sets forth in the act of sale that he has received a portion of the price in cash, and notes of the vendee payable at a future day and secured by mortgage on the real estate for the balance of the price, but actually received in place of the cash, and without being induced to do it by error or fraud, drafts of the vendee or some third person, such drafts will not entitle the vendor, or his transferee, to a mortgage, or vendor's privilege on the property sold.

**A** PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J.*

*Land & Taylor* for plaintiff and appellant.

*N. C. Blanchard* and *J. A. W. Lowry* for third opponents and appellees.

*Duncan & Moncure* and *Looney & Elsner* for Marks, third opponent.

The opinion of the court was delivered by

SPENCER, J. This is a controversy as to the distribution of the proceeds of the "Red-Chute" plantation, seized under execution process in the above suit.

The facts out of which arises this controversy are as follows :

On January 21, 1873, James B. Pickett sold to R. W. Daugherty (now deceased) the Red-Chute plantation, in Bossier parish, for \$18,000, "paid as follows: five thousand dollars in cash, the receipt of which is hereby acknowledged; the balance in three equal annual installments;" the first due January 1, 1875; the second January 2, 1876; and the third January 1, 1877; said three installments being represented by the vendee's notes, duly paraphed: "In order to secure the payment of each of said notes at maturity, etc., the vendor retains, and the vendee grants, a special mortgage" on the property sold. On January 2, 1877, James B. Pickett

transferred by public act, and with full subrogation to plaintiff, the note due January 1, 1876.

The note due January 1, 1875, was paid. Mrs. Kate B. Pickett, wife of said James B. Pickett, claims to hold the note due January 1, 1877, under circumstances hereafter to be stated.

James Marks bases his claim upon the following alleged facts :

He says that the \$5000 cash payment acknowledged in said act was not in fact made ; but that, *in lieu of the cash*, James B. Pickett accepted from Daugherty two drafts drawn by the latter on and accepted by James R. Arnold, one for \$2550, and one for \$2866 42, both dated January 21, 1873, the former due at sixty days, and the latter at later day; that the draft for \$2550 was indorsed without recourse by Pickett, the payee, and delivered to Boisseau & Ford for collection ; that it was protested for non-payment; that by authentic act Boisseau & Ford transferred it with full subrogation to Edwards & Holmes, represented by James R. Arnold, declaring in the act that it bore vendor's privilege on the Red-Chute plantation, which act was duly recorded, and bore date March 6, 1873; that Edwards & Holmes transferred it on July 14, 1873, to J. U. & H. M. Payne & Co., who brought suit against Daugherty thereon in Bossier, and obtained a judgment therefor of date September 23, 1876, recognizing a special mortgage and vendor's privilege therefor on said Red-Chute plantation, which judgment was duly recorded in mortgage office. To this suit neither Pickett, Mrs. Pickett, nor Durham were parties. Marks claims under this judgment.

Durham, the plaintiff, claims to be paid by preference over Mrs. Pickett, on the ground that her title and possession of the second note is simulated, and that James B. Pickett, who is plaintiff's transferor, is the real owner, and can not participate until plaintiff's note is satisfied. He opposes Marks on the ground that he has not now and never had any mortgage or privilege on the plantation to secure said draft. Mrs. Pickett claims concurrence with Durham, and opposes Marks on same grounds.

Marks opposes Durham on the ground that he acquired the note after its maturity from Pickett, and after Pickett had assigned the draft, and has only Pickett's rights, and can not oppose him, Marks, therefore, because Pickett is the transferor of the draft, and could not concur with him, Marks. Marks opposes Mrs. Pickett on the same grounds as Durham does.

The judgment below decreed concurrence between Durham and Mrs. Pickett, and superiority to both over Marks. Durham and Marks appeal. There is a suggestion in the brief of counsel for plaintiff that Mrs. Pickett is not authorized to bring this suit. It is stated in the petition that her husband "authorizes and assists her." No exception

was taken to her want of authority, and the question can not be now raised. C. P. 320, 321, 327, 333, 344 ; 4 Rob. 172 ; 5 R. 96.

We shall first consider the claims of Marks, under two aspects :

First—Did the drafts given by Daugherty to Pickett in lieu of the cash payment acknowledged in the act of sale ever bear mortgage or privilege upon the Red-Chute plantation ?

Second—If they did, have these securities been lost or destroyed by want of registry, or by payment of the drafts ?

First, as to the existence of the mortgage and privilege.

It is manifest that no mortgage existed, because none was reserved or granted in the act to secure any thing but the notes.

It appears that by agreement between Pickett and Daugherty the former accepted *in lieu* of the cash, \$5000, acknowledged to have been received in the act, Daugherty's two time drafts for \$5416 42, drawn on and accepted by Jas. R. Arnold. The \$2866 42 draft was duly paid ; the \$2550 draft was protested while in the hands of Boisseau & Ford, who swear they held it as agents, and for account of James B. Pickett. Pickett himself having accepted these drafts in lieu of the cash acknowledged to have been received in the authentic act, could not be heard in the absence of allegations of fraud, error, or violence, to deny, either as against Daugherty or any body else, the truth of his acknowledgment of payment. As to him, and those claiming under him, that much, \$5000, was paid. If he saw proper to accept property or drafts in lieu of the cash, it was another transaction. He must be considered as having exchanged the \$5000 cash for the \$5416 42 in time drafts. In other words, Daugherty paid the cash by discounting his drafts to Pickett.

This case can not be distinguished in principle from that of "Abat vs. Nolte's Syndics," 6 N. S. 636. In that case, as in this, the vendor of the land in the act of sale acknowledged receipt of the price. It was proved that, in point of fact, no cash was paid, but that the vendees gave the vendors a bill of exchange therefor.

The court say : "It appears to us from the documents and evidence that the price of the sale was to be paid by a draft ; that, trusting in the honor of the vendees, the vendors acknowledged the receipt of the price in the act of sale, and shortly after received the draft. After this they could not have any privilege, *for the payment of the price was consummated according to the intention* of the parties, and the form of the act shows that the vendors had no idea of retaining a privilege. But, if even the original intention of the parties had not been that payment should be made by a draft, *by receiving the draft in payment*, the vendors extinguished their original claim." This case is cited approvingly by this court in "Cammack vs. Griffin," 2 A. 175, and its doctrine is in perfect consonance with reason and law. Every consideration of public

interest and justice forbids the recognition of the opponent, Marks', pretension. If the vendors of property, or their assignees, be permitted to falsify their own deliberate and solemn acts and declarations, spread upon the public records, that the whole or part of the price of property sold has been received in cash by them, and to prove that they still have the vendor's privilege therefor, although avowing that they had voluntarily, without error, fraud, or violence, received another thing in lieu of the cash, what value would mortgage securities possess? What faith would public records be entitled to? Pickett had no mortgage or vendor's privilege on the Red-Chute plantation for these drafts, and could, therefore, confer none on his transferees. The judgment of *Payne & Co. vs. Daugherty*, decreeing such against defendant therein, was clearly wrong. It may be binding as *res adjudicata* on Daugherty, but on no one else. It could not recognize what did not exist. Its registry created only a judicial mortgage against Daugherty.

Second. But there is still another insuperable objection to Marks's pretensions, and that is that the draft for \$2550 was, before it reached J. U. & H. M. Payne & Co., from whom Marks derives his claim, taken up by James R. Arnold, the acceptor thereof, and thereby extinguished by confusion or payment. Arnold in his testimony says: "The interests of Edwards & Holmes and himself were almost identified, he owning nearly the entire interest in the house." In another place he says he took up this draft with money of the firm of Edwards & Holmes, represented by him, to whom Boisseau & Ford transferred it. Again, he says: "On the day of the protest of this draft it was paid by Edwards & Holmes to Boisseau & Ford, the holders thereof. This draft was transferred by Edwards & Holmes to James R. Arnold, who transferred the same to J. U. & H. M. Payne & Co., for advances made by them to said Arnold." Hence, it is clear that whatever rights J. U. & H. M. Payne & Co. had in this draft they derived from Arnold, its acceptor, in whose hands it was extinguished. Now, Arnold did have rights under this draft, but only by way of an action against Daugherty, for re-imbursement of the amount paid therein, and to secure himself in this right he took from Daugherty on the twenty-first January, 1873, a special mortgage on other lands than the "Red-Chute" plantation, to secure him for his acceptance of these drafts. Neither Arnold nor his transferees, Payne & Co., could enforce that mortgage until Arnold had paid the drafts. He did pay them, and Payne & Co., by suing Daugherty to enforce this mortgage, as they did, necessarily admit such payment. The judge *a quo* did not err in decreeing Marks's claim inferior to that of Durham and Mrs. Pickett.

It only remains to consider the contest as between Durham and Mrs. Pickett. We may premise by saying that it is matter of no

moment to plaintiff whether Mrs. Kate B. Pickett, the wife, or Mrs. Paulina Pickett, the mother, of James B. Pickett, owns the note; nor whether the transfer from Mrs. Paulina Pickett to Mrs. Kate Pickett is or not simulated; for if James B. Pickett is not the owner, then the note can not be excluded from concurrence with plaintiff's note, since it is only the transferor who is postponed to his transferee.

On July 3, 1866, Mrs. Paulina Pickett sold to her son, James B. Pickett, a valuable plantation known as "Cash Point," for \$100,000, for which he gave five notes of \$20,000 each, due annually thereafter from January 1, 1867. On May 5, 1871, J. B. Pickett produced these five notes before the recorder, and had the mortgage and vendor's lien securing them canceled.

Mrs. Paulina Pickett swears that in payment of a balance due her on this sale James B. Pickett delivered to her the note now held by opponent, Mrs. K. B. Pickett; swears that she had the actual and real possession and custody of the note from that time to March 1, 1878, when she sold and delivered it to her daughter-in-law for \$5300, paid in an accepted sixty-day draft for \$2300, and a note for \$3000, of which she furnishes copies; that early in the year 1878 her son, J. B. Pickett, tried to sell the note for her, but without success. She admits frankly her own insolvency and her belief that her son is insolvent. There is no dispute as to the fact of the sale of Cash-Point place. It is also shown that Mrs. K. B. Pickett is separate in property from her husband, and is the owner of a large and valuable plantation, which she cultivates, and on the crops of which she has at times obtained advances for large sums. The question is, does the note held by Mrs. K. B. Pickett belong to her or to Mrs. Paulina Pickett or to James B. Pickett? We frankly confess that we look with suspicion upon these family transactions, these dealings between parents and children and husbands and wives, wherever there appears to be opportunity or temptation to gain some unjust advantage thereby. We have scanned the evidence in this record closely, and must say that it gives to these transactions an air of reality and truth which we do not feel at liberty to disregard.

Mrs. Paulina Pickett, now an old and venerable lady, tottering on the very verge of the grave, swears positively that her son delivered into her actual possession the note in question three years before its maturity, and that she continued so to hold it in satisfaction of said balance on "Cash-Point" place. The fact of this large indebtedness by the son is not disputed, and it corroborates powerfully her statement that he owed her. The fact of her surrendering the five notes to him, no doubt at his solicitation, in order to cancel the mortgage, is not inconsistent with the idea that he owed her a balance of four or five thousand dollars. It was but the natural promptings of maternal affection, and

what ninety-nine out of a hundred widowed and aged mothers would have done for a son in whose house she was spending the remnant of her days; nor is the fact that her son tried to sell the note for her of any significance, as he would naturally have been called upon to render such a service; nor do we attach more weight to the alleged large price, \$5300, paid by Mrs. K. B. Pickett to her for the note, which then exceeded \$6000 in amount. It should have brought the blush of shame to the cheeks of her daughter to have offered less for it than the mother gave for it. The evidence does not satisfy us that James B. Pickett is the owner of the note. On the contrary, it satisfies us that he transferred it to his mother in 1874, and, so far as concerns plaintiff, it is matter of no moment whether she or Mrs. K. B. Pickett now owns it.

In either case, the judgment appealed from is correct, and it is affirmed at costs of appellants.

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No. 786.

SUCCESSION OF J. W. ZACHARIE, ON OPPOSITION OF THE CITY OF NEW ORLEANS ET AL.

Evidence in proof of a claim is admissible, although it may appear, *prima facie*, that the claim is prescribed.

The fact that tax-bills have been filed in court is not proof that suit has been brought on them.

Debts due the city of New Orleans on account of unpaid taxes are prescribed in ten years from the time the taxes are exigible.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*Percy Roberts* for the succession, appellee.

*James Lingan* for himself and other creditors, appellees.

*Samuel P. Blanc* for the city, appellant.

The opinion of the court was delivered by

DEBLANC, J. The city of New Orleans opposes the account filed by the executor of the last will of J. W. Zacharie, for the reason that he refused to class it as a creditor of said succession for the taxes of 1860, 1861, 1862, 1863, 1864, 1865, 1870, 1871, 1873, 1874, 1875, 1876, and 1877. It prays that the lien securing the payment of said taxes be recognized, and that they be paid in preference to every claim carried in the executor's account. This opposition was filed on the 14th of August 1877.

In bar of the city's action for the taxes due before 1867, the executor pleads the prescription of one, two and ten years. His plea was sustained by the lower court and the city has appealed.



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Succession of Zacharie.

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On the trial of its opposition, the counsel representing the city offered in evidence the tax-bills made out for the years anterior to 1867. That evidence was improperly excluded; but said bills are transcribed in the record and can be considered by us as if they had been regularly admitted by the lower court.

Our attention is called to the fact that some of those bills have been filed in court in 1865, 1866 and 1873, and we are asked to infer from that fact that they have been sued upon and that judgments may have been obtained thereon. This we can not do: If such suits had been brought and such judgments obtained, the city attorney would not have failed to introduce copies of the same.

The counsel who now represents the city contends that—since 1856—the action which it has for the recovery of taxes levied within its limits is imprescriptible, and—to sustain his position—he relies on a section of the charter which provides: “that taxes assessed under and by virtue of this act, on the property, real or personal, of any person or corporation, are hereby declared to be a lien and privilege upon the said property, to date from the first day of March of the year for which they may be assessed, any alienation thereof or incumbrance thereon notwithstanding; and said lien or privilege *shall exist in favor of the City of New Orleans, for the respective amount of taxes assessed UNTIL THE SAME SHALL BE FULLY PAID*; and the same shall be paid in preference to all mortgages and incumbrances other than taxes due the State.”

The property on which were assessed the taxes, the amount of which is claimed by the city, has been sold under orders of the second district court, and it is clear that any right which it may have had on said property was transferred from it to the proceeds of the sale.

Is the city entitled to be paid, by preference to every creditor, out of the proceeds of the sale of said property? The lower court correctly held that—as concerns the taxes levied before 1867—the city is not entitled to the preference it claims.

So far as we are informed by the record, the first and only demand made by the city for the taxes which it alleges are due to it, was made after the death of Zacharie, after the judicial sale of the property which belonged to his succession, and that was in 1877. The lower court sustained the city's opposition as to the taxes which were levied in and from 1870, and dismissed its opposition as to those taxes which were levied prior to 1867, and which had been due and exigible for upwards of ten years, when the city applied to the second district court to compel the executor of Zacharie's will to class it in his account as a creditor of said deceased's estate, for the taxes assessed on his property from 1860 to 1877.

It is said that, under a special provision of the city charter, the tax

is to remain a lien on the property subject to it until the tax is paid in full, and that the terms of said provision exclude the idea of any limitation to the right of enforcing that lien, at any time, against any one and under all circumstances. That too broad construction would—as regards the city of New Orleans—amount to a judicial abrogation of the laws which fix the prescription of debts and actions, impart to its tax liens a dangerous immortality, and encourage—in the collection of its annual revenue—a negligence far more injurious to its interests than the prescription invoked against it.

In the case of *Pepper* against *Dunlap*, this court said: “Under the Spanish law, property could be acquired by prescription against the crown &c, and—under our Code—we find no express exception in favor of the State. In *Graham*, Auditor, against *Tignor & als*, it was held, and we adhere to those decisions, that the current of prescription is not impeded by the fact that the suing creditor is the State. Those decisions are based on the article of our Code which declares “that prescription runs against all persons, unless they are included in some exceptions established by law.” The corporation of New Orleans—as the State—is a body politic, and—in law—an intellectual person, and—as it may acquire and be released by prescription, there is no reason why it should be excepted from its effects and operation, when it appears in a court of justice and claims as a creditor. In this instance, its action is barred by the lapse of ten years. C. C. 3521 (3487); 3544 (3508); 9 A. 137; 23 A. 570.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is affirmed with costs.

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CONCURRING OPINION.

MANNING, C. J. I concur in the decree in this cause, but I do not wish to be understood as assenting to the doctrine that general laws regulating prescription affect the rights of the State. The State is sovereign, and when she enacts laws fixing the time within which actions must be brought upon pecuniary obligations, or for the establishment of rights of property, she is legislating for her citizens, and is not imposing restrictions upon herself, and such laws do not affect her own rights unless she in terms includes herself within their operation.

The argument drawn from the phraseology of our Code is inconclusive. It is said that since the State is not specially exempted from the operations of the laws of prescription, she must be held to be affected by them as is an individual or a corporation. The terms of the statutes of limitation of other States are as broad and comprehensive as are the articles of our Code touching prescription, and it has been, and is uniformly held in those States, and in the Supreme Court of the United

States, that the doctrine *nullum tempus occurrit regi* is in as full force in this country as it is in England.

It is not necessary for the decision of this cause to pass upon the question, so far as the State is concerned, and therefore the argument does not need to be elaborated now. I understand the doctrine to be stated only *arguendo* in the opinion of the court just read, but to avoid misapprehension, I prefer to dissent from that portion of the Opinion.

MARR, J. I concur in the opinion of the Chief Justice.

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116 882

No. 823.

I. BLOOM & Co. vs. LEON KERN ET AL.

Where a party agrees to pay a certain stated account made up of principal and accrued interest, and the aggregate amount of the principal and interest exceeds \$500, the district court will have jurisdiction of the debt.

Letters of a debtor to his creditor declaring his inability to pay, and asking for indulgence, are such an acknowledgment of liability as interrupts prescription. Interruption of prescription by the acknowledgment of the principal debtor interrupts it as to his surety.

The promise of a surety assuring the payment of the price of a specific lot of goods to be sold to the principal debtor is not a continuing guarantee, and hence does not cover other goods subsequently sold to the principal.

Where the debts are of like nature the imputation of payments is made to the debt longest due.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*R. W. & R. Richardson* for plaintiffs and appellees.

*Cobb & Gunby* for Marx, defendant and appellant.

The opinion of the court was delivered by

MARR, J. This suit was brought to recover a balance of account for merchandise, which, it is alleged, Kern promised to pay, and Marx, in writing, guaranteed.

Defendants excepted to the jurisdiction of the district court, on the ground that the amount in dispute is made up of principal and interest, and that it does not exceed \$500, exclusive of interest.

The goods were sold in 1873; and the precise allegation of the petition is that Kern promised to pay the balance sued for, "as shown by the specific bill hereto annexed." This bill is an account, containing all the items to the debit and credit, with interest on each to ninth February, 1877, about two months before the suit was brought. If this allegation be true, it would simply mean that Kern had consented that the balance shown by that account, \$547 61, should be capitalized on the ninth February, 1877; and this balance would be a new debt, the princi-

pal sum, bearing interest only *in futuro*. The district judge correctly overruled the exception.

Kern plead the general issue, and the prescription of three years. Marx specially denied that he ever assumed to pay plaintiffs the account sued on. He avers that in March or April, 1873, he agreed to become surety to plaintiffs for the purchase price of one lot, invoice, or stock of goods to be furnished to Kern, and that they were, shortly after, paid for by Kern; and that he, Marx, never, thereafter, assumed, or in any manner bound himself for any indebtedness of Kern. He pleads the prescription of three years; and that plaintiffs, by delay and negligence, have lost their action against Kern, and thereby discharged any surety he may have given.

The judgment of the district court was in favor of plaintiffs, against defendants, *in solido*, for the \$547 61, with legal interest from judicial demand, eleventh April, 1877; and Marx appealed.

If Kern had appealed, we should affirm the judgment against him. As he has not appealed, it is necessary to consider the case against him in so far only as it may affect his surety, Marx. He testified that plaintiffs had written to him about this debt, asking payment. "I don't think, though, they have since January, 1874. I think I replied to their letters and begged time on the debt. I consider that I promised to pay it. In these letters to me the amount of the balance due by me was mentioned."

In *Robinson vs. Day*, 7 An. 201, this court held that letters written by the debtor to his creditor, declaring his inability to pay, and asking for indulgence, is such an acknowledgment of liability as interrupts prescription. It is manifest from part of Kern's testimony, on cross-examination, that the account sued on was shown to him, at the office of plaintiff's attorneys; and that he looked at the closing and balance brought down. Precisely what he said to the attorneys at that time is not shown.

We think there was such an acknowledgment by Kern as takes the case out of prescription; and that the surety is bound by this acknowledgment so far as the plea of prescription by him is concerned. R. C. C. 3553.

The liability of Marx for the debt of Kern can not be proven otherwise than by written evidence. R. C. C. art. 2278. The written evidence in this case consists of two letters of Marx to Bloom & Co., dated at Monroe, one on the seventh, the other on the ninth April, 1873. The first part of the letter of seventh April relates to his own business, ordering goods for himself. It concludes thus: "My brother-in-law, Mr. L. Kern, tells me that he selected some groceries at your house, which you, however, will not ship, without my say so. Please ship the same by the first boat out, and I will see that every thing is right."

The letter of ninth April is as follows : "Yours of fifth came to hand, with invoice. In reply, Mr. Kern, I want you to ship the goods he selected, and I will see it paid in time. You shall be safe if it takes the last dime I have. I will tell you more when I see you. My regards to your family."

The testimony shows that Kern had gone to New Orleans, and selected a stock of groceries, which Bloom & Co. would not sell him on his own credit. He either returned to Monroe, or wrote to Marx; and the result was the two letters just mentioned. On the twelfth April Bloom & Co. sold the goods to Kern, the whole amounting to \$640 87. They subsequently sold other goods to Kern, on the thirtieth April, thirteenth and twenty-ninth May, twenty-third June, and ninth July, 1873, the whole aggregating \$1063 91.

Kern remitted sums of money, and made payments to Bloom & Co. at different times, twenty-ninth April, thirteenth and twenty-fifth May, eighteenth June, ninth July, 1873, and sixth and fifteenth January, 1874, amounting to \$654 56, carried by Bloom & Co. into general account in the settlement sued on.

It is manifest that the letters of Marx of seventh and ninth of April were not intended, nor can they be construed as a continuing guarantee. They are limited to the single transaction, the purchase of the goods which Kern had already selected, and which, on the faith of these letters, were sold and delivered by Bloom & Co. to Kern on the twelfth April, 1873. There is nothing in these letters indicating the intention of Marx to be surety for the price of any other goods, that might afterward be selected by Kern, and sold to him by Bloom & Co.; and the amount, as we have seen, was \$640 87. The interest on this amount, from the twelfth April, 1873, to the fifteenth January, 1874, the date of the last credit, at five per cent, would be \$24 74, which, added to the \$640 87 gives total \$665 61: and interest on the several items of credit, at the same rate, to same date, would be \$21 69, which added to the credits, \$654 56, gives total \$676 25. Bloom & Co. have calculated the interest at eight per cent; but whatever the rate may be, the result would be the same, that is, the credits and interest would exceed the debt guaranteed by Marx, and the interest. Bloom & Co. have made up a single account; but in it the several purchases, at their respective dates, are footed separately, thus distinguishing them, the one from the other: so that each invoice was kept and treated as a separate purchase. This was necessary, because Albert Bloom and Isaac Bloom, witnesses in their own behalf, testified that all the sales to Kern were on sixty days time, as usual. So that Kern owed Bloom & Co. as many different debts, of a like nature, as there were different invoices, each exigible at the expiration of sixty days from the date of each purchase, respectively.

The Code declares that when the debts are of like nature, the imputation of payments is made to the debt which has been longest due. R. C. C. art. 2166. We think the debt guaranteed by Marx was extinguished on the fifteenth January, 1874, more than three years before the account sued on was made up; and while it might have been competent for Kern, as between himself and Bloom & Co., to have consented to the account as made up ninth February, 1877, he could not bind Marx to pay eight per cent interest, charged in the account for nearly four years, nor deprive Marx of the extinction, by legal imputation, more than three years before this suit was brought, of that part of the debt, the oldest in date, for which he was surety.

Of course the judgment against Kern, from which he has not appealed, will not be disturbed by our decree; and we deal with the judgment of the district court only in so far as it affects the appellant, Simon Marx.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far only as it condemns Simon Marx, the appellant, *in solido* with Leon Kern, be and the same is hereby annulled, avoided, and reversed; and the demand of plaintiffs, appellees, I. Bloom & Co., against the said Simon Marx is rejected and dismissed, the costs of this appeal and the costs incurred by the said Simon Marx in the district court to be borne and paid by the said appellees, I. Bloom & Co.

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No. 819.

THE STATE VS. JAMES BEATTY, ALIAS WM. BROWN, ET AL.

The fact that the accused attempted to escape from prison a few days before his trial, on a charge of murder is admissible in evidence. The time of the attempt is not material, as bearing on the question of its admissibility.

The State may introduce evidence to prove contradictory statements made by the defendant's witness at another time.

Unsworn statements made after the trial of a criminal case by one of the jurors in the case, going to impeach his own verdict, or to show misconduct in the jury, are not admissible in evidence on the application for a new trial.

This court is without jurisdiction to consider the testimony of witnesses, and disputed questions of fact, on which applications for new trials in criminal cases are made.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*W. N. Potts*, District Attorney, for the State.

*W. J. Q. Baker* and *R. J. Caldwell* for defendant.

The opinion of the court was delivered by

EGAN, *J.* Beatty, *alias* Brown, one of the accused, was indicted, tried,

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46	858
30	1266
50	455
30	1266
114	78
30	1266
124	784
124	977

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State vs. Beatty.

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and found guilty of murder without capital punishment, whereupon he was sentenced to imprisonment for life in the Penitentiary. He has appealed. The case is before us on three bills of exception and a motion for new trial. The first bill was to the reception of evidence to show that the accused a few nights before the day set for trial broke jail and attempted to escape from the parish prison. On behalf of the prisoner it is urged that to be admissible the evidence must be of an attempt to escape immediately succeeding the crime charged. Attempts to escape on the part of one accused of crime are not of themselves sufficient to authorize conviction, but if shown lend a strong presumption of guilt, unless otherwise explained. They are classed with other *ex post facto* indications of mental emotion, and are receivable in evidence, but are to be weighed in connection with the surrounding circumstances, and the time at which the attempt is made is not material except as going to show the animus of the accused. The usual rule is laid down in Wharton's Am. Crim. Law, sec. 714, and we have been referred to no authority limiting it. This bill was not well taken.

The second bill is to the reception of the evidence of one Madden to discredit the testimony of Louisa Brown, a witness for the accused, by showing that she had made other and contradictory statements at another time, on the ground that the witnesses for the State had been placed under the rule and not permitted to remain in court during the giving in of testimony by other witnesses, and that Madden's name was not furnished the defendant, nor had he been put under the rule, but was present in court while Louisa Brown was testifying. The district judge states that Madden's evidence was offered and received *only* as to the contradictory statements made by the defendant's witnesses at another time. For that purpose it was receivable. Waterman's Crim. Dig. p. 607, sec. 189, and authorities cited; 1st Greenleaf Evidence, par. 432, note 2. This bill was not well taken.

The third bill of exceptions is to the reception of the testimony of Gilbert, a witness, whose name had been furnished to the accused, and who had been under the rule, but who, after having testified on behalf of the State, was permitted to remain in the court when Louisa Brown, defendant's witness, was testifying. As we understand from the bill the evidence of this witness was offered and received for the same purpose with that of the witness Madden. The same principle therefore applies, as the evidence related only to discrediting the defendant's witness. This bill was not well taken.

The fourth bill of exceptions is to the refusal of the district judge to receive evidence in support of one of the grounds of motion for new trial of the statements of Wallace, one of the jurors, made on the street in the presence of several persons after the verdict had been rendered,

to the effect that when he first went into the jury-room he was in favor of acquitting the accused, and that after he had made that known, one of the jurors said to him, "If you will say 'guilty' I will give you one dollar and a half and a good bed to-night;" and he then agreed to find the accused guilty. It is well settled that a juror will not be allowed to testify to impeach his own verdict or to show misconduct in the jury with that view. *A fortiori*, then, will not hearsay testimony of his unsworn statements to other persons be received for that purpose. Wharton's Am. Crim. Law, secs. 3155-6; Waterman's Crim. Dig., p. 456, sec. 172, and authority cited. This bill was not well taken.

The motion for new trial is upon two grounds, one of which is the alleged misconduct of the jury in the manner attempted to be shown by evidence of the statements of the juror Wallace, already discussed. Of this it may be remarked that we have nothing before us except the affidavit of the accused appended to the motion for new trial, and we can not interfere on this ground with the discretion of the district judge. The other ground set up in the motion for new trial is "that on the night of Friday, the tenth of May, 1878, and after the jury had retired to consult on their verdict, and about the hour of ten o'clock of the same night, the entire jury, accompanied by the deputy sheriff in charge of the jury, and while they were under deliberation, retired to a drinking saloon on DeSiard street, in the city of Monroe, about five or six squares from the court-house, without the order of court, and there partook of intoxicating liquors, the bill of which was paid by one of the jurors." This, if true, was certainly a very gross irregularity on the part both of the officer in charge and of the jurors themselves, and one for which all should have been punished by the district judge if the facts were made known to him. We learn from a statement by the court in the record that his "instructions to the sheriff after the trial of this case had been concluded were to take charge of the jury and not allow them to separate, and to provide such refreshments as were necessary." These instructions were proper and usual, and if any such loose practice prevails among the officers or jurors of his district as is charged, it would be well for the judge to put a stop to it in future and to charge officers and jurors accordingly. We are induced to make these remarks by the appearance in this record of the testimony of witnesses given on the hearing of the motion for new trial below, which while we can not consider for the purposes of the motion when thus presented, having no jurisdiction of the facts in criminal cases under the constitution, would, if we could consider them, induce us without a moment's hesitation to set aside the verdict and sentence. It is not to be tolerated that jurors in a capital case, especially, should be allowed to walk about the streets for recreation at night and enter so public and exposed a place as a bar-



## State vs. Beatty.

room or drinking-saloon, and there drink liquor or other beverage at the public counter. If such things are permitted all the labor and time spent in procuring the conviction of criminals will go for naught and the ends of justice be defeated or delayed, while at the same time it will be impossible to preserve purity in its administration. We are compelled, however, to remind counsel that we can no more, under the constitution, take cognizance of the testimony of witnesses given on a motion for new trial in a criminal case than the evidence given on the trial itself, and that even when it comes before us in the record we can not consider it. See 3 An. 497; 2 An. 921; 1st H. D., p. 412, par. 6, and cases cited. We can not pass upon the effect of evidence for any purpose in a criminal case; nor, unless the facts upon which the judge *a quo* bases his ruling in a matter of new trial are certified to us by him in a bill of exceptions, can we review that ruling, whether it related to misconduct of the jury or other grounds which involve the proof of facts and evidence always more or less contradictory. Our province in such matters is simply to say what the law is upon a state of facts either admitted by the State or certified to us regularly by the judge himself as those on which he based his own ruling. 2 An. 837, 838; 3 An. 497; State vs. Brown, 4 An. 505; and again 1st H. D. p. 412, par. 6, and cases cited.

It is therefore ordered and decreed that the verdict and sentence appealed from be and they are affirmed.

## No. 825.

## ELIZA L. STROTHER vs. T. P. RICHARDSON, SHERIFF, ET AL.

The judgment creditor and his debtor are incompetent to form a private agreement, or bond, which shall have the force and effect, and be clothed with the extraordinary characteristics of a "Twelve-months Bond."

The clerk of the court is without authority to issue, and the sheriff to execute a writ of *fiat facias* to enforce, with a judicial decree, the provisions of a bond formed by private convention.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*W. J. Q. Baker, John T. Ludeling, and Robert Ray* for plaintiff and appellant.

*W. W. Farmer* for defendants and appellees.

The opinion of the court was delivered by

**SPENCER, J.** In the suit of "*Gerson vs. Warfield*" plaintiff obtained judgment by confession. Subsequently, plaintiff assigned the judgment

to Lehman, Abraham & Co., who issued execution thereon, upon which the sheriff makes the following return :

"Received in office, April 30th, 1874, and on the first day of May, 1874, the plaintiff's attorneys having taken a consent twelve-months bond in favor of Lehman, Abraham & Co., owners of the judgment and writ in this case, executed before me May 1st, 1874 ; I therefore return this writ as directed by Morrison and Farmer, attorneys for plaintiff and owners of judgment.

B. H. DINGRAVE, Sheriff."

The bond is signed by Mrs. Warfield, the defendant, and by Mrs. Strother, as surety. The condition of the bond recites the existence of the judgment, the issuance of the execution, and concludes thus :

"Whereas, the said defendant, Mrs. Eliza W. Warfield, desires to avoid the trouble, loss, and costs of further proceedings in the execution of said writ, by executing a consent twelve-months bond, in favor of Lehman, Abraham & Co., owners of said judgment, in all respects as if all the formalities, delays, and advertisements which precede the forced execution of a twelve-months bond under arts. 681, 682, 720, and 721, Code of Practice, had been fully complied with ; all of which said formalities, delays, and advertisements are hereby expressly waived by said defendant ; and whereas said Lehman, Abraham & Co. have consented to accept this twelve-months bond and to return said writ to the clerk's office,

"Now, therefore, if the said E. W. Warfield, principal on this bond, shall well and truly pay, etc., \* \* then this bond shall be void, otherwise, etc., to have the force and effect of a twelve-months bond, taken according to arts. 720 and 721 of Code of Practice."

The bond is attested by two witnesses and the sheriff. In several districts of the State this custom of taking twelve-months bonds by consent and agreement has prevailed for years, and, as will be seen hereafter, there is no reported case adjudicating upon its legality.

Not being paid at maturity, plaintiff caused execution to issue as on a twelve-months bond, and, property of the surety having been levied upon, she enjoins, by this suit, the sale thereof.

The sole question presented for our decision is, whether this instrument thus executed has the force and effect of a twelve-months bond ; and does it confer on the clerk authority to issue, and on the sheriff authority to execute, a writ of *feri facias* directing the seizure and sale, without appraisement, of the property of the principal and surety? We are constrained to answer both questions in the negative. It is undoubtedly true, as argued by defendant's counsel, and as held by the judge *a quo*, that contracts containing nothing contrary to law or good morals are binding on the parties, and constitute laws for them. But the question here is not whether this contract is binding on Mrs. Warfield and Mrs.

Strother, but whether they can by agreement with Lehman, Abraham & Co. confer on the clerk and sheriff authority and power which the law has not conferred on them. Can parties confer on the clerk authority to issue execution for a debt not evidenced and made executory by judgment? Certainly not. And why? Because the clerk derives his authority from the law, and not from the consent or agreement of parties. The law has prescribed when and upon what conditions the clerk can issue writs of *feri facias*. A judgment is rendered, and in execution thereof a writ of *fi. fa.* issues, property is seized, and sold for cash or on twelve-months credit. In the latter case a bond is given, and, if not paid, another writ issues in execution. The public interest demands that these essential forms be complied with. The certainty and security of titles, depending as they do, upon the orderly conduct of judicial proceedings, requires that *individual agreements* should not be substituted for *official acts*. Grave and important consequences attach to and follow the forced alienation of property, and in many instances the rights of third persons are directly or indirectly affected thereby. Thus, a forced alienation under a first mortgage divests the property of a subsequent and junior mortgage. What security would there be to such subsequent mortgages if by a private agreement between the debtor and the holder of the first mortgage such a bond as that in this case could authorize the seizure and sale without appraisement of the property? Would the purchaser at a sale under the enjoined writ in this case acquire a title unencumbered by mortgages that may have attached since the recordation of the original judgment? These instances are stated to illustrate the grave importance there is to the public that judicial proceedings and the processes in execution thereof should be conducted under the forms of law. In our opinion there can not be a twelve-months bond clothed with the extraordinary characteristics given thereto by the Code of Practice, except as the result of a seizure and sale of property. A twelve-months bond under our law clothes the creditor with extraordinary and exceptional rights, just as the authentic act importing confession of judgment does. The law has prescribed certain essential forms for the existence of both, and there is no more reason for saying that parties can give to a private agreement the force and effect of a twelve-months bond than there is for saying they can give to a private agreement, without the intervention of the officers and forms required by law, the force and effect of an authentic act.

While the case of Levi Johnson vs. Hopson (decided at Monroe in 1855, but not reported,) differs from this case in some important particulars, and notably in this, that in that case the "consent twelve-months" bond was executed before and in anticipation of the rendition of a confessed judgment, yet we think the general principles announced

Strother vs. Richardson.

in that case are pertinent and eminently applicable to this, and may serve as a fit conclusion to what we have already said. The court there said :

"The bond is a private agreement executed in contemplation of an amicable suit and a judgment to be rendered thereafter. It might serve as the foundation of a suit against the principal and surety thereon to enforce their obligation so far as possible by the intervention of justice, but it can not be introduced into the records of a court without its assent, and made the basis of those summary proceedings which are only allowed upon a strict compliance with the forms of law. Those forms are prescribed in the interest of the public ; many of them, it is true, may be waived by the parties, but they must be waived at the proper time and before the proper officers.

"Departures from settled rules of practice in judicial matters are always hazardous : and although this may be a hard case upon the appellees, who seem only to be seeking to hold the appellants to the terms of the agreement, yet we must look to the remote consequences which would flow from a decision relaxing the rules that govern forced alienations of property. Upon those rules depend in a high degree the security of private rights and the repose of titles."

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed ; and it is now ordered and decreed that the injunction sued out by plaintiff against the execution herein enjoined be made perpetual ; reserving to the owners of said bond any right of action they may have against plaintiff by reason of her suretyship on said bond. It is further ordered that defendants pay costs of both courts.

Rehearing refused.

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No. 799.

WILLIAM E. RAPP vs. S. M. LOWRY, SARAH A. DORSEY ET AL. WARRANTORS.

A tax assessor is not authorized to assess and advertise lands for sale, as the property of an "unknown" person, when it appears that he could, with ordinary diligence, have ascertained who the real owner was.

While the tax deed to land sold as the property of an unknown person is *prima facie* evidence of a valid sale, yet, in the absence of recital in the deed, and proof *aliunde* of the appointment of a curator to represent the unknown owner, and of service of the twenty-days notice on the curator, the sale of the land by the assessor is absolutely void. A vendor of property can not subsequently acquire an outstanding title superior to the one he conveyed, and in virtue of this superior title oust his vendee of the property.

**A** PPEAL from the Twelfth Judicial District Court, parish of Franklin.  
Smith, J.

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Rapp vs. Lowry.

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*Wells & Ellis* for plaintiff and appellee.

*W. W. Campbell* for defendant and appellant.

The opinion of the court was delivered by

MARR, J. This is a petitory action, in which plaintiff seeks to recover 160 acres of land, the northwest quarter of section five, township thirteen, range eight east, of which Lowry is in possession, claiming title under Mrs. Dorsey and others, warrantors.

Rapp claims under a sale, made on the fourteenth December, 1872, for the taxes of 1871 ; and the collector's deed, dated December 16, 1872, and the Auditor's confirmatory act, of October 26, 1876. The land was assessed and sold as the property of an owner "unknown."

In his answer Lowry alleges that the land in controversy is known to have been the property of S. W. Dorsey, or of the estate of S. W. Dorsey ; and that the true owner was known to Rapp at the time, before and since the pretended sale under which he claims to have acquired title.

The warrantors derive title from H. S. Dawson, the grantee of the government, who sold and conveyed the land, some 4000 acres, to S. W. Dorsey, in 1836, by private deed, recorded since the tax sale. They allege the nullity of the proceedings under which Rapp claims : that the land was improperly assessed as the property of persons unknown ; and that it was well known to the tax collector and to Rapp, who was the real owner, from previous assessments in the name of Dorsey, by whom taxes were paid.

They aver that there was no seizure, or advertisement, or public sale of the land ; and that they have not been made parties to any proceedings had to effect the forced sale, neither by personal notice, nor in any other legal manner.

The evidence shows that Rapp knew that Dorsey owned a large body of land in the parish ; and that he assisted in making up the assessment rolls. It was proven that this land, more than 4000 acres, had been assessed to Dorsey : that he had agents in the parish at different times, who paid the taxes ; and two tax receipts were offered in evidence showing that Dorsey had paid, personally, by drafts, the taxes for 1857, and 1858, on a valuation of \$19,296.

By the constitution, art. 118, deeds made by tax collectors are to be received in evidence as *prima facie* valid sales ; but they may be contradicted : and we think the pleadings in this case make it incumbent on the plaintiff, claiming as owner, to establish something more than a *prima facie* title to the land in the possession of the defendant, claiming also to be the owner.

We do not think the assessor can assess lands as the property of a person "unknown," without having, first, honestly endeavored to ascer-

tain the name and residence of the owner ; and it is not probable that the ownership of a body of 4000 acres of land, which had been owned by the same person for nearly forty years, a resident of an adjoining parish, in whose name it had been assessed, who had, through himself and his agents paid the taxes for some years, could be unknown in the sense of the law. Section 23, of the act of 1871, required the assessors to make diligent inquiry, between February and July, in order to obtain correct information as to the taxable property in the parish, the description, and the names of the inhabitants. The testimony shows that the assessor could, without much trouble, have ascertained from residents of the parish, and from the tax rolls for former years, that S. W. Dorsey was the owner of this large body of land.

Upon the hypothesis that the circumstances justified the assessment of this land as the property of a person "unknown," certain legal formalities were required in order to effect a valid sale. Section fifty-seven, of the act of 1871, p. 120, required the tax collectors to give twenty days public notice, written or printed, to the person in whose name the assessment is made, to pay the tax, after which the collector may make a seizure, by recording a description of the property, with the amount due, in the mortgage-book of the parish in which it is situated ; and, on the fourth day after such recordation, he shall proceed to sell, without legal process, to pay the tax and all lawful costs, after advertising three times within twenty days.

Section sixty, of the same act, required, in all cases of vacant property, or when the owners were unknown or absent, and had left no known agent, the parish or district judge, on application of the tax collector, to appoint a curator *ad hoc*, upon whom the notice was to be served ; and if, within twenty days after notice, the tax was not paid, the tax collector might seize and sell the property without process of court, as prescribed in section fifty-seven.

The recital in the tax collector's deed, with reference to notice is as follows : "By virtue of the power in me vested by law, I did give to 'unknown' due and legal notice, that he owed the following taxes, to wit, \* \* \* for the year 1871, which taxes were duly and legally assessed on the following property, to wit : the northwest quarter of section five, township thirteen, range eight east, containing 160 acres, more or less, \* \* \* and the said 'unknown' not having paid said taxes within said legal delays, I gave said 'unknown' twenty days further written and printed notice to pay said taxes, and the said 'unknown' still failing to pay said taxes, I proceeded to make seizure," etc.

There is no mention of the appointment of a curator *ad hoc*, and, what is more important, there is no proof in the record of the appointment of a curator *ad hoc* as required by section sixty of the act. The

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Rapp vs. Lowry.

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tax deed is evidence *prima facie* of a valid sale ; but in the absence of recital in the deed, and of proof *aliunde* of the appointment of a curator, and the service of notice on him, the sale of the land of an owner non-resident and "unknown" is not valid : It is absolutely void.

It is proven in this case that on the 13th of April, 1870, Rapp sold and conveyed to Lowry, the defendant, his claim and interest in and to lands which he had purchased at tax sales, containing near 1300 acres, supposed to be in sections five and eight of township thirteen, range eight east. Of course this included all of the two sections. Lowry says it included the quarter section in controversy, as it did, of course, and much more besides. It was called the Routh place, because John K. Routh had settled on it ; but Lowry says that he gathered from his conversations with Rapp that Rapp knew that it was part of the Dorsey tract. Rapp himself says : "It was my understanding that Routh settled on the Dorsey land, I believe on a part of the 4000-acre tract. After I saw Dorsey, in 1869 or 1870, I did not know who the land belonged to. I proposed buying from him the 4000-acre tract, or part of it. He remarked to me that he could not sell it then, that he would correspond with parties in Maryland that had an interest in the land, and he would let me know : and he remarked, 'I don't own the land myself.' \* \* \* In my conversation with Dorsey he made an impression with me that he had an interest in the land. Did not know what interest, nor in what part of the land."

He also states that the land which he purchased for taxes, in 1867, the same which he sold to Lowry on the 13th June, 1870, was assessed to John K. Routh ; and that he thought it was Dorsey's land because he had seen it assessed to Dorsey "prior to the time that I had seen it assessed to Routh."

The deed from Rapp to Lowry was recorded on the 16th of July, 1870, and Lowry was in possession under that deed at the time the land was assessed, and at the time it was sold as the property of a person "unknown," of which Rapp could not have been ignorant.

If the tax sale and title under which Rapp claims were otherwise valid, there would still be an insuperable barrier to his recovery of the land from Lowry. If this land were properly assessed and sold as the property of a person "unknown," it was not Lowry's property; and it must have been the property of some person "unknown" at the time Rapp sold to Lowry : and Rapp has simply acquired, since his sale to Lowry, a title which was outstanding at the time that sale was made, superior to the title which Rapp conveyed to Lowry. It is shocking to morals, and to common honesty and decency, it can not be tolerated in law, that a vendor, even without warranty, should subsequently acquire a title superior to that which he conveyed to his vendee, and attempt to

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Rapp vs. Lowry.

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oust his vendee under that title. The exclusion of warranty in the deed from Rapp to Lowry exempts Rapp from responsibility to Lowry for eviction by any other person under a superior title; but it does not release Rapp from responsibility for any disturbance of Lowry by himself, or by any other person under a title emanating from him, outstanding at the time of his conveyance to Lowry. If there be such superior outstanding title, Lowry might be evicted under it; but not by Rapp; and any title which was outstanding at the time Rapp conveyed to Lowry, and which Rapp has acquired, or may hereafter acquire, to the land conveyed by him to Lowry, must inure to the benefit of Lowry. It seems that Lowry had no great confidence in the title conveyed to him by Rapp, and he merely fortified himself by acquiring a title from the owners, deriving from the Government.

The district judge erred in maintaining the title set up by Rapp and awarding to him the land which he had conveyed to Lowry.

The judgment appealed from is therefore annulled, avoided, and reversed; and it is now ordered, adjudged, and decreed that the demand of plaintiff, appellee, be rejected, and that his suit be dismissed; and that he be condemned to pay the costs of this appeal and the costs in the district court.

No. 849.

CHAS. D. GILMORE VS. B. F. LOGAN ET AL.

The debt due for services as an agent or mandatary is only prescribed in ten years. When one obligates himself in writing to pay a certain sum on the happening of a certain event, the obligation is only prescribed in ten years.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo. Boarman, J.

*Land & Taylor and Kennard, Howe & Prentiss* for plaintiff and appellant.

*Nutt & Leonard* for defendant and appellee.

The opinion of the court was delivered by

SPENCER, J. Plaintiff, who was a member of the firm of Hosmer & Co. of Washington City, sues as owner and transferee of the rights of said firm in and to a certain claim for \$5000 against the defendant, which arose as follows: He alleges that said firm were "the agents and mandataries of the defendant," under a mandate, to prosecute before Congress and the departments at Washington a claim for restitution of what was known as "the arsenal property," in Shreveport; that they procured the release of said property about March, 1873, and were by



written contract with defendant to receive therefor \$5000 as compensation.

The defendant answered not by general denial, but specially "admitting his signature to the note" and averring "that plaintiffs did not render the services for which the note was given, as the United States government surrendered its claim to the property which plaintiff was employed to recover, without action on plaintiff's part, and that the consideration has failed." This special defense waived the general issue—admitted the employment as alleged—the terms of that employment—its purposes, etc. See *Burbank vs. Haas*, 9 An. 528; 11 An. 103; 19 An. 461. But, outside of this implied admission, the evidence fully sustains plaintiff's allegations. The power of attorney under which plaintiffs acted, of date fifteenth May, 1872, constituted them his true and lawful attorneys in his name, place, and stead, to prosecute before the departments or Congress, the claim in question, "with full power of substitution and revocation, etc."

The defendant abandons all defense on the merits, and pleads the prescription of three years against plaintiff's claim, under article 3588 C. C., whereby "actions of attorneys for fees are prescribed by three years." This is the sole defense made before the court. It was sustained by the judge *a quo*, and plaintiff appeals.

First—It is manifest, as well by the implied admission of defendant as by the proofs in the record, and especially by the contract of mandate referred to, that Hosmer & Co. were employed as agents and mandataries, and not as attorneys-at-law. That their mandate was not in connection with matters before the courts, but before the departments and Congress.

Second—The very article of the Civil Code under which defendant invokes the prescription of three years says: "This prescription only ceases from the time there has been an account acknowledged, a note or bond given, or an action commenced." Even if plaintiffs had been employed in their capacity as attorneys-at-law (which they were not), defendant took their claim out of the three-years prescription by the following bond or written obligation:

"Whereas, I have made application to have restored to the heirs of the late Benjamin F. Logan, deceased, late of Shreveport, State of Louisiana, a tract of land situate in said city of Shreveport, through Messrs. Hosmer & Co., attorneys-at-law, of Washington City, D. C., and have empowered them to prosecute the claim of said heirs before the War Department or Congress. Now, for and in consideration of services rendered and to be rendered in the premises, I hereby agree to pay my said attorneys the sum of five thousand dollars (\$5000) when the land shall have been restored to said heirs, which said sum shall include all

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 Gilmore vs. Logan et al.
 

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amounts to be paid for said services, and in case of failure to recover said land for said heirs I am to pay nothing; the words now in possession of the United States erased before signing.

"B. F. LOGAN.

"Witnesses :

"MONTFORD JONES.

"A. H. LEONARD."

This is an absolute promise to pay a *specific sum* of money upon the happening of a certain event—and is barred only by ten years under C. C. art. 3544. The cases in 12 R. 28 and 3 An. 458 are inapplicable here where there is a written agreement *fixing absolutely the amount to be paid*, and the condition upon which the payment is to be made.

Defendant dismissed his call in warranty, and we are not called upon to pass upon it.

The plea of prescription was improperly sustained. The evidence fully sustains plaintiff's demand. Indeed, it is not contested.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled and reversed, and it is now ordered and decreed that plaintiff, Chas. D. Gilmore, do have and recover of the defendant, B. F. Logan, the sum of five thousand (\$5000) dollars with five per cent interest thereon from fourth March, 1873, and all costs of both courts.

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No. 791.

N. FASS vs. RICE BROS. & Co.

The question of simulation when put at issue in any case, will be determined by a review of all the surrounding facts.

**A**PPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Smith, J.*

*Boatner & Elam* for plaintiff and appellee.

*Wade R. Young* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. Isaac B. Fass had been a merchant, or trader—got in debt—and broke. Shortly afterwards a new store was opened, wherein business was carried on in the name of N. Fass thus;—"N. Fass per I. B. Fass agent." Isaac had a son, by name Nathan. It was he that was meant by N. Fass. The lad was not of age, but he had already made a precocious start—had contracted debts, and had pleaded minority when sued for them. He manifested a vicious propensity to plead it

again, and reproached the defendants' lawyer for having taught him the device.

The steamboat, *Tensas Belle*, became the property of these people, or one of them. The title was in Nathan. The defendants had a judgment against Isaac, upon which they issued execution, and had the boat seized. The present plaintiff enjoins, and the defendants attack the sale and title to Nathan Fass as simulated, and justify the seizure, alleging that the boat belongs to Isaac Fass, and was bought with his money actually made by his business, or borrowed by him.

Simulation is rarely susceptible of direct and positive proof. At best, you can resort only to the proof of other facts, from which there is fastened upon the mind the conviction that the simulation is also a fact. The statement of the relations between the parties, and their previous history, gives strong colour to the charge. To rebut it, the plaintiff relies upon Ben Gerson, his New-Orleans correspondent. He commences by saying he does not know the plaintiff personally, but he has been dealing with his father as his agent—that plaintiff owes him, and the debt was contracted by his father (his agent) for plaintiff's account. He puts it in another form—the debt was incurred through Isaac B. Fass, the agent of N. Fass. The credit was extended to N. Fass through Isaac B. Fass his agent. He looks to Nathan as the party owing him. Nathan never appeared as an actor in the business. It was all done through his father who was his agent. He extended the credit to Nathan individually, and upon the experience of Isaac, which led him to believe that he could meet the payment of the same. He had no security of any kind.

It is apparent that this witness was giving credit to Isaac Fass alone. He did not know Nathan, but he did know that Isaac, for some cause, was doing business in this roundabout way. He repeats in three different ways that Nathan is his debtor, whom he has never seen, who has furnished him no security, and who, so far as he knows, is not in existence, but it is on Isaac's experience that he relies for repayment. The same witness' depositions, taken in another cause, are in evidence, wherein he is more explicit. I considered, he says, the old man Isaac as being badly crippled in business, and not being able to use his own name, took that of his son to do business under. He relates the manner in which his business connection with Fass commenced. He came to me two or three years ago, and represented himself as the agent of Nathan Fass, and obtained of me advances upon that representation.

That is to say, upon Isaac's representations that he was the agent of Nathan, whom the witness did not know, had never heard of, and of whose ability to answer a judgment he was ignorant, and of whose

integrity he knew nothing—the witness, being a business man in New Orleans, incontinently gave credit to Nathan, and loaned him money.

In another place he states the actual facts without prevarication;—my view of the relations existing between Isaac and Nathan Fass was, the real man was Isaac B., who could not conduct business under his own name, and for that reason had adopted the name of his son Nathan for the purpose of doing business.

That is our view also. The steamboat was the property really of Isaac, the debtor of the defendants, was property seized by them, and the plaintiff's injunction was improperly granted.

There seems to be a popular notion, and it has crept into the profession, that a man has but to pretend to carry on business in another's name, while he is actually sole owner and manager, to succeed in screening his property from the pursuit of his creditors. There is really no excuse or justification of this concealment, and the practice will not find encouragement from the manner in which we deal with it.

The plaintiff prays for damages. We shall give them to the defendant.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be judgment in favor of the defendants, dissolving plaintiff's injunction, and for ten per centum damages and costs.

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No. 859.

WHITE & BARRETT vs. WM. HEFFNER, SHERIFF, ET AL.

A partnership is not within the language or intendment of the exemption law, and hence none of the property of a partnership is exempt from seizure.

**A** PPEAL from the Tenth Judicial District Court, parish of Caddo.  
*Boarman, J.*

*Hicks & Hicks* for plaintiffs and appellants.

*Nutt & Leonard* and *R. J. Looney* for defendants and appellees.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs injoin the execution of a judgment in favor of G. W. Dillard for one thousand dollars and interest, upon which there has been credited a payment of seventy-one dollars. The execution issued at the instance of Dillard's executrix, and the tutrix to his minor heirs, and seizure was made of "a power press, six cases of type, galleys, rules, five imposing stones, one desk, two stoves and pipe, three desks, and one table."

The allegations of the injunction are that the plaintiffs are practical printers, and that the articles of property seized, worth two thousand dollars, are exempt from seizure because they are the tools and implements of their trade, and necessary to its exercise, by which they gain a living.

The plaintiffs compose a partnership, the business of which was formerly to print and publish a newspaper, and to do job-work. White swears the daily newspaper had ceased to be published sixteen weeks before the seizure. Then it became a weekly, and that expired on 30th. of June. In another place he says he commenced the weekly after the seizure. The seizure was made August 9th.

The firm continued to do job-printing after the newspaper was no longer issued, and one of them testifies that the annual receipts from their entire business were three thousand dollars. The attorney, who ordered the seizure for Mrs. Dillard, seems to have been careful to instruct the sheriff not to seize the material of the job-office, but when that officer requested White to point out such things as belonged to that department, he refused to give him any assistance, and warned him that it was a government office he was entering, and he might get himself into trouble by seizing government property. It appears one of the firm was collector of the port there.

The fact appears to be that no portion of the materials seized belonged to either department exclusively, except perhaps the imposing stones. The press, galleys, most of the type, rules, were used indiscriminately for either the job-work, or the newspaper. A printing establishment in such a country-town as Shreveport would not need two separate and distinct departments. The stoves would not appear to belong to any printing business.

Some testimony was taken as to the unprofitableness of the newspaper business in Shreveport, probably with a view of showing that the plaintiffs could not have made their living by it. But one of them has sworn to the amount of annual receipts, and also that they owed for rent, and materials, and paper. The lessor's claim is for \$850, the material man's is \$220, and the amount of the debt for paper is unmentioned. It is very easy to see how one can support a family on a business as large as this is shown to be, when all the receipts are consumed at home, and none are applied to the payment of debts.

The claim of exemption of this property from seizure is based on art. 644 of the Code of Practice, and we are referred to an express adjudication of this court on the nature and extent of the exemption so far as it applies to a printer. *Prather v. Bobo*, 15 Annual, 524.

It is not needful to say in this case whether we think a press, and material for printing, can properly or reasonably be included in those

implements, that are necessary for the exercise of a printer's trade or calling. If they are, ninety-nine hundredths of the printers are 'exercising their calling' without the implements that are necessary to do it, and notwithstanding, they 'make a living.' It is sufficient to say, that the exemption is claimed here by a partnership, which is an ideal being, has no living to make, and is not within the language or intendment of the exemption law, which, being in derogation of the general law that all of a debtor's property is the common pledge of his creditors, must be construed strictly.

We are warmly urged to carry out in a liberal spirit the enlightened policy of modern legislation, which seeks to protect the citizen from pauperism. An enlightened policy, which teaches the citizen the weight of an obligation by enforcing its performance, cannot look without dismay at the spectacle of any debtor, keeping secure in his grasp property, not legitimately or necessarily included within the terms of the law which accords it to him. The abrasion of the moral sense of the general public, occasioned by frequently witnessing this successful defiance of just creditors, is a greater harm than the private suffering of an isolated individual here and there, and enlightened statesmanship looks only to the general good.

The judge below dissolved the injunction with one hundred dollars damages. His judgment is affirmed.

No. 811.

MRS. C. S. WILLIS VS. E. M. WARD, TUTOR.

A judgment of separation of property between husband and wife which is absolutely void, may be assailed directly, or collaterally, by any one who has an interest to do so.

A judgment of separation of property in favor of the wife, based exclusively on the incomplete testimony of her husband, is, as to third persons, an absolute nullity. The husband is incompetent to testify in a suit brought by the wife for a separation of property.

**A** PPEAL from the Parish Court of Franklin. *Zim, J.*

*J. W. Willis, Jr., and A. W. Moore* for plaintiff and appellee.

*S. L. Elam* for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. J. D. Montgomery and his wife died in the parish of Franklin, leaving two minor children. At the death of the husband, the wife was confirmed in the tutorship of said children, and—at her death—the defendant, E. M. Ward, was appointed as their tutor by the judge of probate of their parents' last place of domicil.

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Willis vs. Ward.

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John W. Willis applied for and obtained the administration of the succession of J. D. Montgomery, caused to be sold the property thereto belonging, and—at one of the sales made during his administration of said succession, his wife became the adjudicatee of a large tract of land for the price of two thousand two hundred and fifteen dollars, which—according to a declaration in the deed from the sheriff to her—she paid on the day of the sale. This was on the 30th of March 1870. On the 23d of May 1876, that sale was confirmed, in a monition proceeding, by the probate court of the parish of Franklin. Ward—as tutor—opposed that confirmation, but, on account of the unforeseen sickness of his attorney, he was not represented at the trial of Mrs. Willis' application for the homologation of said sale, and his opposition was defeated.

On the 24th of November 1868, Mrs. Willis sued her husband for the dissolution of the community existing between them, a separation of property and the recovery of the sum of eighty dollars, the alleged price of two feather beds, one bureau, one table, one mirror, one washstand and a lot of crockery sold by her husband and which belonged to her.

On the same day—the 24th of November 1868—John W. Willis answered his wife's demand by a general denial, and a judgment was rendered in her favor, read and signed, allowing all that she asked. To such a course, however precipitate it was, there can be no serious objection. Real rights may be urged, established and judicially ascertained and recognized in the space of a moment.

In this instance, how did the wife prove the existence, nature and extent of her rights? By exclusively her husband's answers to three interrogatories propounded to him. He swore that the effects claimed by his wife have been sold by him, that the price of those effects was received, but by whom? He did not say, nor did he say that he was then in an embarrassed condition.

In the case which is now before us, Mrs. Willis charges that Ward—in his pretended capacity as tutor of the children of J. D. Montgomery, is interfering with and disturbing her in the possession of the land which she acquired from the succession of said deceased, and—on that account—she prays that the decree by which he was appointed tutor of said children be declared a nullity and he removed as such.

The cause which prompted Mrs. Willis to bring this action against Ward, is not that he has been careless of the minors' interest, or in any way unfaithful in the discharge of the duties imposed upon him by his appointment, its acceptance and the law, but for the reason, which she herself states, that Ward claims as belonging to the minors, the tract of land herein referred to and to which she—Mrs. Willis—considers that she has acquired a title. This is her only reason: as to the grounds on which she relies to procure his removal, they are: that, at the date of

his appointment as tutor, the children of J. D. Montgomery were not residing in the parish of Franklin, but with their grandfather—in the State of Mississippi, and that—as to them—the Louisiana court by which the appointment was made was without jurisdiction ; besides—that no one but their grandfather was then entitled to the tutorship conferred on defendant.

To plaintiff's action, Ward opposed the exception that she had not been authorized by her husband to institute this suit, and the plea of "*res judicata*." His exception and plea were tried and overruled, and he answered. In his answer, he asserts the legality of his appointment, alleges that Mrs. Willis' judgment against her husband was obtained with the latter's consent, without proper evidence, for the express purpose of defrauding the minors Montgomery, and that said judgment should be pronounced a nullity.

Mrs. Willis contends that the question raised by defendant as to the validity of her judgment against her husband was already raised by him and determined by the Court in the opposition which he filed to her application for the confirmation of the sale from the sheriff to her ; and—to that branch of his demand—she, in turn, filed the exception of *res judicata*.

Plaintiff's and defendant's demand were both rejected. Defendant alone has appealed : he contends that the judgment of the lower court should be amended, plaintiff's plea of *res judicata* overruled, and the decree which separates her in property from her husband declared a nullity. This was partly done below : the plea of *res judicata* was one of the defences of Mrs. Willis against the tutor's action, and—in this case—though the whole of her demand was denied and rejected, she does not ask either the reversal or amendment of the decree by which it was done.

Plaintiff's counsel objected to the introduction of any evidence tending to show the invalidity of the judgment which she obtained against her husband, on the ground that said judgment could not be attacked collaterally : his objection was not sustained, the evidence received, and her counsel excepted to the decision of the court on this point. For at least one reason, that exception was not well taken : defendant, after having alleged and established an interest so to do, had—in positive terms—assailed as being invalid and as having been rendered on illegal evidence, the judgment of Mrs. Willis against her husband, and she—on the trial, as a part of her own evidence—offered the entire record of the suit in which that judgment was obtained, including the testimony therein contained.

That judgment based—as it is—on exclusively the incomplete testimony, or rather the willing confession of her husband, who—the Code



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Willis vs. Ward.

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so expressly provides—can not be a witness for or against his wife—art. 2281 (2260)—constitutes but a private agreement between them, decides nothing as to third parties, and—as to the latter—“has only the effect of a transaction made in an authentic form.” Such a judgment is—as to all, except perhaps those who have consented to its rendition—an absolute nullity which can be urged directly or collaterally, by any one who has an interest so to do, whenever it is presented as the basis of a disputed right or contested action, and more particularly when—as in this case—the testimony or confession on which it is rendered would be insufficient to sustain its validity, even if given or made by any other than one whose testimony could have been heard, received and considered, but in disregard of a prohibitory law. 2 A. 907 ; 3 A. 34 and 35 ; 4 A. 276 ; 6 A. 2 ; 12 A. 426 ; 29 A. 732.

Were it otherwise, plaintiff resides in Richland, defendant in Franklin, and—under the circumstances—the latter could have instituted an action in reconvention against the former in any cause, although such demand be not necessarily connected with, or incidental to the main cause of action.

C. P. 375.

It is in the power of litigants, by their pleadings, by the course they pursue on the trial of their suits, to present or avoid issues, to close the door against or open it to this or that evidence, but the issue once presented can not be limited so as to serve the purposes of only one of the litigants, the door opened to plaintiff's evidence can not be arbitrarily closed against defendant's rebuttal, and those who stand before a court of justice, one asserting, the other denying the validity of a judgment, can not—by a tardy and inconsistent exception—destroy the inevitable effect of their own pleadings, their own evidence, and prevent the court from passing upon the asserted and denied validity.

In a suit brought by the wife against her husband for a separation of property, the testimony of the husband is not admissible to sustain any part of her demand. It follows that, in the suit of Mrs. Willis against her husband, no competent witness has testified, no legal evidence has been received, and that the judgment rendered in her favor was and remains an absolute nullity.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended, plaintiff's demand rejected, and the judgment rendered in her favor and against her husband, by the parish court of the parish of Franklin, on the 24th of November, 1868, declared a nullity.

It is further ordered, adjudged and decreed that, as amended, the judgment of the lower court is affirmed, at plaintiff's costs in both courts.

## No. 434.

JOHN FRANK PARGOUD vs. MRS. SARAH RICHARDSON.

This court will not order the production of an original act, when it is not necessary to the decision of the case.

Where a defendant who has enjoined an order of seizure and sale appeals from the decree rendered in the injunction suit, he is not thereby estopped from also appealing from the order of seizure and sale, when it appears that the grounds set up in the injunction suit are not the same as those presented in the appeal from the order.

It is not necessary that any United States internal revenue stamps should be affixed to a note, or a mortgage, in order to make it competent evidence in our State courts.

An order of seizure and sale may issue on a note and mortgage when neither has any United States internal revenue stamps on it. Neither the allegation nor proof of a previous demand for payment, or presentment at a particular place is necessary to obtain executory process, although the note is payable at such a place, when the note is secured by a mortgage importing a confession of judgment.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J.*

*S. D. McEnery and Cobb & Gunby* for plaintiff and appellee.

*W. W. Farmer* for defendant and appellant.

## ON MOTION.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves for an order to the Recorder of Ouachita parish, commanding him to send up the original Act of Mortgage, a certified copy of which was produced before the judge of the lower court as part of the evidence upon which he granted the order of seizure and sale. The object of the motion, as disclosed in it, is to enable this court to ascertain from personal inspection of the Act, that it has now affixed to it all the United States internal revenue stamps that the Act of Congress requires.

The motion is resisted on the ground that, whatever quantity or amount of revenue stamps may be now upon the Act, there were not enough of them upon it at the time the order of seizure and sale was made to give it validity, and that we can only consider its then condition.

The motion is based on art. 917 of the Code of Practice, which empowers this court to direct orders to public officers to produce before it original papers, when they may be necessary to the decision of a pending cause.

We do not think the inspection of the paper in question is necessary to the decision of this cause, and we should do a vain and useless act in ordering its production before us, and therefore

The motion is denied.

## DISSENTING OPINION.

EGAN, J. In my opinion the order prayed for should be granted. The plaintiff's motion sets forth that the production before this court of the original paper is important to the determination of the cause. This is sufficient to entitle him to his order under the 917th art. of the Code of Practice. The questions as to the effect of the document when produced, or whether it can have any effect upon the present appeal, are matters which do not come properly before us on this motion, but would be the subject of consideration when the appeal is heard. The granting of the order to produce could not affect the interests of the defendant if the paper could not be considered when produced, while on the other hand its production might be both necessary and proper if it could be considered on the appeal.

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ON REHEARING.\*

MANNING, C. J. Pargoud sold the Ingleside plantation to Mrs. Richardson, and retained the vendor's lien and a special mortgage to secure the payment of the purchase price. The first maturing note not having been paid, he obtained an order of seizure and sale of the property. This appeal is from that order. It was heard and decided four years ago. 26 Annual, 672. The defendant prayed a rehearing, which was not acted on by our predecessors. Two dissenting opinions were read, but are not published, maintaining the defendant's position of the invalidity of the mortgage for want of stamps. We found the case in that condition last year, and granted the rehearing.

The vital question in the case is presented by the objection that neither the note, nor the mortgage, were valid, or receivable in evidence, for want of the United States internal revenue stamps required by the Act of Congress. The note was unstamped. The mortgage had not as many stamps as the Act required.

The plaintiff's counsel appears to rely upon that clause of the U. S. internal revenue law, which permits the non-stamping a note when it is secured by a mortgage, and the mortgage is properly stamped; and upon another clause which allows a mortgage, which has not upon it the requisite quantity of stamps, to be taken before a revenue officer and to be stamped by him with the additional number necessary under the law, which subsequent stamping validates it, and makes it retroactive.

To this, the defendant's counsel replies that the appeal is from the order of the judge, made upon the evidence before him then—at the moment it was granted—and not upon the evidence, as it might have been afterwards transformed by the cabalistic touch of the revenue

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\* The opinion on the original hearing will be found in 26 Annual, 672.

officer. And he argues that if the evidence in its then condition was insufficient to authorize the order of seizure and sale, no subsequent addition to it, nor after-cure of its then inherent defects, could validate an order which was unlawful when it was made, because the proper legal evidence was not before the judge when he made it.

It is obvious there can be no evidence before us of any subsequent stamping of the mortgage, because the record contains only the evidence on which the judge *a quo* acted, and we have refused the plaintiff's motion to have produced the original Act of mortgage from the Recorder's office.

The whole of this dispute is to our minds outside the real question, which is, whether any U. S. internal revenue stamps whatever must be affixed to a note, or a mortgage, in order to make it competent evidence in our State courts. Our convictions are very clear that none are necessary.

The argument, made with great zeal and earnestness before us, in support of the contrary proposition, is that the Constitution of the United States confers upon Congress the power to lay and collect taxes, duties, imposts and excises to pay the debts of the federal government, and in express terms makes that Constitution, and the laws of the United States which shall be made in pursuance thereof, the supreme law of the land, adding that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. Const. art. 1. sec. 8. art. vi. sec. 2. The conclusion drawn is that as Congress, in providing for the internal revenue of the general government, required that notes and mortgages should be stamped, and punished the failure to comply with its mandate by prohibiting their reception as evidence in any court, and even by pronouncing their nullity—therefore every State court must enforce that law without question of its validity, or of its proper application, being 'bound thereby.'

By the same argument we should be compelled to use the trial by jury in any civil cause where the value in controversy exceeds twenty dollars, (7th amendment to U. S. Const.) and we should be prohibited holding any one to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. (Amendment V.) And yet we know that civil causes, are, and have been always, tried in this State without a jury, regardless of the value in controversy; and that persons are, and from the beginning of our State government, have been held to answer for many infamous crimes, not capital, upon an information filed by the prosecuting officer, and without the intervention of a grand jury.

Since *Maurin v. Martinez*, 5 Mart. 436, it has not been doubted that

the provisions of the federal constitution relative to juries refer only to trials in the federal courts, and do not apply to the State tribunals. And earlier than then, it was held that the amendment to the federal constitution, which requires the intervention of a grand jury relates only to crimes cognisable by the United States, and to criminal proceedings in its courts : *Territory v. Hatick*, 2 M<sup>art</sup>. 88.

When then the Congress prohibits a court from receiving in evidence any unstamped note or mortgage, we must assume that it has reference alone to the United States courts, as its prohibition is only obligatory upon them.

It is said however that nothing is left to inference, since the act of Congress declares that these unstamped instruments are void—that an unstamped note, for instance, is not a valid obligation, and its payment cannot be enforced. The construction of several of the State courts of this branch of that act is, that the mere fact that the instrument is insufficiently stamped does not render such instrument invalid, but the intent to evade the act does. *Sawyer v. Parker*, 57 Maine, 39. And in a criminal prosecution it was ruled that the instrument was not void for the want of a stamp in such sense, that an indictment for its forgery would not lie. *Cross v. People*, 47 Ill. 152. It would seem that unstamped instruments, or instruments insufficiently stamped, are thus supposed to be valid or void, not because they have or have not stamps upon them, but only when the omission to affix them proceeds from a fraudulent intent ; and in accordance with this idea, it was held that the subsequent affixing the stamp negatived the intent to evade the act. *Craig v. Dimock*, 47 Ill. 308. Not a safe or certain doctrine, it would seem, but one born of a wish to recognise a doubtful power, and at the same time to restrict it within such limits that its exercise would not impinge the authority of the State. It is not needful for us to consider this act in any other aspect than its attempt to impose rules upon the State courts as to the admission of evidence. It is not within the province of Congress to enact rules regulating the competency of evidence upon the trial of causes in a State court. The power to lay taxes is undoubted, but it is not broad enough to include the authority to declare that a written instrument of any kind shall not be received as evidence in a State court unless it is stamped. That is a restriction which appertains alone to the legislative authority of the State. In domestic transactions, in no manner connected with the general government, the State has the exclusive power to establish the rules of evidence in her own courts. And this conforms to the decisions of the highest courts in many of the States. *Bowlin v. Commonwealth*, 2 Bush, (Ky.) 5. *Boston v. Nichols*, 47 Ill. 353. *Hanford v. Obrecht*, 49 Ill. 146. *Clemens v. Conrad*, 19 Mich. 170. *Black v. Nettles*, 25 Ark. 606. Our impression is that

Pargoud vs. Richardson.

the same ruling has been made in Massachusetts and Maryland, but we have not now access to the authorities.

Our Codes have authorized orders of seizure and sale to be made upon the production of the note, evidencing the debt, and a certified copy of the authentic act of mortgage providing for its payment and have defined an authentic Act. Civil Code, art. 2231 new no. 2234, arts. 3360 *et seq.* new nos. 3397 *et seq.* Code of Prac. arts. 61 *et seq.* The instruments offered in evidence by the plaintiff conform to these requirements of our law, and it is not necessary or proper to look beyond, or outside of that law, to ascertain upon what evidence the judge could legally issue the order.

The only other ground of objection to the order was, the note was made payable at a particular place, and no evidence in an authentic form was before the judge that the note had been presented at that place. It is now settled law that a mortgagee, with a title importing a confession of judgment, may immediately seize the property, if in the hands of the debtor, without proof of failure of payment. *McDonough v. Fost*, 1 Rob. 295. Neither the allegation nor proof of a previous demand for payment, or presentment at a particular place, is necessary to obtain executory process, although the note is payable at such place. *Ripka v. Pope*, 5 Annual, 61. *Ibid.* 187. *M'Calop v. Fluker*, 12 Annual, 551. *Stokes v. Forman*, *Ibid.* 671. *Catalogue v. Alva*, 13 Annual, 98.

The judgment of our predecessors was an affirmance of that of the district court. We do not place ours upon the same grounds which they did, but we reach the same conclusion.

It is ordered and decreed that the former judgment of this court remain undisturbed.

No. 867.

W. E. HAMILTON ET AL. VS. NELLIE HODGES, TUTRIX, ET AL.

An ordinary partnership can not be held liable for the individual debt of one of its members because of an agreement to that effect between that member and his creditor, unless it be proved that the member was authorized to make the agreement by his copartners, or that his agreement was ratified by them, or that the partnership was benefited by the transaction.

Parol evidence is inadmissible to prove a promise to pay the debt of a third person. The ratification of a contract can only be deduced from facts, when those facts evince clearly, and absolutely, the intention to ratify.

**A** PPEAL from the Eleventh Judicial District Court, parish of Caddo.  
Boarman, J.

N. C. Blanchard for plaintiffs and appellees.

W. H. Wise for defendants and appellants.

The opinion of the court was delivered by

DEBLANC, J. In March 1870, two brothers—John J. and Jackson

80 1290  
110 790

30 1290  
120 33

B. Hodges, now dead, formed a planting partnership which lasted until the fall of 1873. W. E. Hamilton, one of the plaintiffs testified that John was the business manager of that partnership, and that Jackson had very little to do with it. In the early days of March 1870, plaintiffs opened separate accounts with the aforesaid partnership and with each of its individual members, and—on the 18th of August 1871 they received from John J. Hodges, in full settlement of their accounts, two notes, one for \$2242.59c, which fell due on the 1st of March 1872, and was paid out of the proceeds of cotton grown by and belonging to the partners, the other for \$2421.49c, which matured on the 1st of March 1873.

This suit is brought on the last mentioned of said notes, which is in these words: "We promise to pay to the order of Hamilton & Co. twenty four hundred twenty one 49-100 dollars, with interest at 8 per cent from maturity until paid, value received.

(Signed)

JNO. J. & J. B. HODGES,  
and "JNO. J. HODGES."

The executor of the last will of Jackson B. Hodges, avers that said note was not signed by the deceased, but by his brother John, without said deceased's knowledge or consent, and for an old indebtedness of John to plaintiff, which accrued partly before and partly after they became partners, and did not enure to the benefit of their partnership.

To this defence, plaintiff's reply is: that the contracting of the indebtedness was authorized, and—if it was not—that it did enure to the benefit of the partnership, and that the settlement of that indebtedness by the delivery of the two notes herein mentioned was ratified by Jackson B. Hodges.

As to the fact of the alleged ratification, what evidence is relied upon? It was shown that, in the statements of accounts rendered to the partnership, mention is made that the individual liabilities of its members was merged into the partnership accounts, which—according to W. E. Hamilton's declaration—their firm always rendered to John J. Hodges, who—it seems—had complete control of the plantation. At his death, they were found among his papers in the house occupied by the two brothers. They were there in a desk, but to whom the desk belonged, by whom it was used, whether it was locked or unlocked, whether Jackson had access to it, or ever opened it, the witness was not asked and did not tell. That circumstance is not even an entire link, but merely the fraction of a link in the chain of presumptions which would justify the conclusion that Jackson B. Hodges has authorized that merging of accounts or ratified the settlement thus made by his brother.

Were Hamilton and Co., or John J. Hodges, empowered—the first-

to merge, the latter to sanction the merging of three distinct liabilities, and to burden one of three debtors—the partnership—with the separate liabilities of the two others? They were not.

“No member of an ordinary partnership can bind his co-partner, unless he was given the power to do so, either specially or by articles of partnership, or unless it be proved that the partnership was benefited by the transaction.” R. C. C. 2872 (O. C. 2843) 2874 (2845).

In *Dumartrait, ad., et al. vs. Gay et al.*, this court properly held that, “when co-partners in an ordinary partnership deny that they are liable for the contract made by one of them, the creditor, who seeks to hold them responsible under it, must prove one of two things: either that the contract was authorized by them, or that it enured to their benefit.” In this we cannot see any great hardship. It is the duty of every one who deals with a member of an ordinary partnership who shows no authority to bind his co-partners, to know at his peril that the transaction is to enure to the benefit of the partnership.

1 R. R. 64—5 M. 684—1 L. 390—6 L. 304—13 L. 197—14 L. 364—15 L. 496.

“Where any creditor of one member of a firm takes from his own debtor, either in payment or as security for his debt, the paper of the firm, the presumption of law is, that he took it in fraud of the firm: and without proof of their interest, or *their assent and authority*, which may be circumstantial, the firm will not be held.”

Parsons on Contracts (6th ed.) vol. 1, 184.

Hamilton and Co. either knew, or—by merely inquiring—could have ascertained that John J. Hodges had no authority to bind the partnership for a debt which it had not contracted, which—on the books of the creditor—was not charged against it, but charged against other parties, by special instruction from them to the creditor. In so doing, they participated in the execution of an act, which they knew, or could—without difficulty—have ascertained was, not only not authorized, but unjust, the partners’ individual liabilities not being equal.

Did that unauthorized act enure to the benefit of the partnership? W. E. Hamilton swore that two drafts of John J. Hodges, one for \$761.03c. the other for \$277.75c, were given to close cash advances made in the months of February and March 1870. In February the planting partnership did not exist. In an account rendered to John J. Hodges personally—on the 20th of June 1870—these two drafts are charged against him, and—at the date those drafts were given—they had advanced to the planting partnership, according to their own account, the sum of forty dollars.

Was it through mistake that those drafts were charged to John J. Hodges? If it was, we are at a loss to imagine how it is that, in the



account rendered to the partnership and which bears the same date as that rendered to John J. Hodges, those drafts are not mentioned. At that date—the 20th of June 1870—the planting partnership was owing Hamilton & Co—including principal, interest and commission—four hundred and thirty-two dollars and seven cents: this is shown by their written statement. The account of the partnership was added to that of John J. Hodges amounting to \$1723.89c, and—on the 12th of September 1870—for those united claims, interest thereon at eight, and commission at five per cent—John J. Hodges gave and Hamilton & Co. accepted the note of the planting partnership. This may be, but it certainly does not look right.

How is this explained by one of the plaintiffs? He testified—on the trial—that account No. 13—that rendered to John J. Hodges personally—was but a cash statement, and that he was satisfied that nearly, if not all of it, was for the benefit of the partnership. He was confirmed in his belief by the fact that statement No. 12, that in which the accounts of the partnership and of John J. Hodges were merged in a grand total, was accepted by the partnership, and its note given for that mixed indebtedness. That indebtedness amounted then to \$2343.05c.

W. E. Hamilton confessed on the stand that he could not swear positively that any of the items in the account made in John J. Hodges' name and rendered to him, were for the use and benefit of the partnership, but he believed it.

By request of John J. Hodges, S. J. Ward paid, of the mixed indebtedness, to Hamilton & Co., and out of the proceeds of the sale of cotton belonging to the planting partnership, the sum of \$2404.50c. When he made that payment, Ward was the factor of said partnership, but he was not aware that Jackson B. Hodges knew that such a payment was to be and had been made.

As concerns the succession of Jackson B. Hodges, the note sued upon is twice invalid: it was given without authority, and—so far as it appears by the record—it is without consideration.

The evidence tending to show that said deceased had been informed of the settlement made by his brother John, had not objected to, but acquiesced in what he had done, was properly excluded: if admitted without objection, it is doubtful that it could have been considered. Whatever is done in contravention to a prohibitory law is null, and the law merely prohibits parol evidence of the pretended promise to pay the debt of a third person, but in all such cases the promise to pay shall be proved by written evidence, signed by the party to be charged, or his specially authorized agent or attorney-in-fact.

C. C. art. 12. 24 A. p. 325. 23 A. 747.

It has not been shown that Jackson B. Hodges knew that the indi-

vidual indebtedness of his brother was included in either the accounts or the notes, or that he had been informed of the character of the charges which—in a few months—had swelled to extravagant proportions the liability of the planting partnership to the firm of Hamilton & Co.

“The facts from which the ratification of a contract is to be deduced, must evince such intention clearly and absolutely,” and the validity of any ratification—express or tacit—can legally rest but upon a previous and full knowledge of the contents of the unauthorized or defective acts to which the ratification is to impart a posthumous and retroactive validity.

13 L. 175—6 R. 184.

The reconventional demand can not be allowed. If Jackson's share in the proceeds of the sale of the cotton had been misapplied, it was done under the instructions of his brother and partner, and his legal representatives have no recourse—for the recovery of the difference which they claim—but against his succession, and not against one recognized by him as his creditor, and to whom he has—right or wrong—paid what he had acknowledged he owed him.

It is, therefore, ordered, adjudged and decreed that—as regards the succession of Jackson B. Hodges—the judgment appealed from, signed on the 22d day of April 1878, is annulled, avoided and reversed, and plaintiffs' demand rejected at their costs in both courts.

No. 794.

HENRY GERSON, JR., VS. LARKIN JAMAR.

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Where a third person in whose possession property has been attached, intervenes, and claims the ownership of the property, his intervention need be served only on the plaintiff in attachment. It is not necessary for him to cite the defendant in attachment who does not dispute his title.

Except in a case of trespass on real estate, a claim for damages can not be made in an intervention against one who does not reside in the parish where the principal action is pending.

A claim for damages against the sheriff can not be coupled with an intervention demand setting up the intervenor's title to personal property attached in his hands.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*W. W. Farmer* for plaintiff and appellee.

*Wells & Potts* for intervenor and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 28th of January 1876, Larkin Jamar—a resident of the parish of Richland—appeared before the deputy recorder of

the parish of Ouachita, and acknowledged that he was indebted unto Henry Gerson junior, a resident of the last mentioned parish, in the sum of twelve hundred dollars, to represent which he (Jamar) delivered to the said Gerson, his promissory note payable in twelve months from its date, and secured its payment by a conventional mortgage.

On the 6th of December 1876, Gerson brought suit against Jamar for the balance due on said note and for the price of plantation supplies furnished and advanced to him. He also—at that date—obtained orders of attachment and sequestration against the property of his debtor, on grounds which—now—it is useless to notice.

Under two writs issued on those orders and directed to the sheriff of the parish of Richland, that officer attached—as belonging to Larkin Jamar, four mules, one mare, five cows and calves, one wagon and one bed, valued at five hundred and fifty dollars.

Joseph F. Jamar intervened in the suit pending between Gerson and Larkin Jamar, avers that—on the 18th of October 1876, he purchased—from the latter—the property so attached, and claims against C. H. Moore—the sheriff—and Gerson, the seizing creditor, actual and vindictive damages on account of said attachment, which—he alleges—was illegal, wanton and malicious. That intervention was directed to and served on only the plaintiff in execution and the sheriff.

On the trial, to prove his asserted title, the intervenor tendered in evidence an act of sale from Larkin Jamar to him. That evidence was objected to by plaintiff's counsel, on the grounds that defendant had not been cited to answer the intervention, had not answered it and that no default was entered against him. The objection was sustained and the evidence excluded. To the ruling of the court on this point, the intervenor excepted.

Plaintiff's counsel maintains that the intervenor's action should have been directed against both, the plaintiff and the defendant. Were the intervenor claiming title to property in contest between the parties to the suit, the counsel's argument would be unanswerable; but he is attempting to arrest the execution of a writ of attachment levied on property not claimed by, and—nevertheless—attached as belonging to defendant, and so attached in intervenor's possession.

If not a third opposition, the intervenor's demand is the twin sister of such a proceeding, and the Code of Practice specially provides that "if the opposition has for its object to set aside the order of seizure, as having been effected on property not belonging to the party against whom the order was directed, but owned on the contrary by the third person making the opposition, it must be done by means of a petition, which—together with a citation—must be served on *the party making the seizure.*" etc. C. P. 396, No. 1, 398.

In a proceeding by intervention, one may join the plaintiff or defendant, or he may oppose both, and—assuredly—either, as the nature of his right and interest may require; and his intervention must be served on whom? The party against whom it is directed, and that party must and can be but one who disputes the existence of the right he claims.

C. P. 389, 393.

What is the effect of an attachment? It divests the owner's possession and vests it in the sheriff, who holds for the benefit of the attaching creditor, and it seems evident that the intervention should be directed against alone those who so hold the property claimed in and by the intervention, and for whose benefit it is held. In such a case as this one, what could the court allow against, and what could the intervenor ask of a defendant from whom he acquired his alleged title to, and his possession of the attached property?

The fact that the petition of intervention was not served on the defendant, and that he was not cited to answer it, neither did nor could deprive the plaintiff of any right, remedy or advantage which—otherwise—he could have exercised. It, in no way, prevented him from proving whether—as he charges—the sale from Larkin Jamar to his son is a simulation, and that formality—if pursued—would have been as useless to plaintiff as to the intervenor. In a proceeding of this description, the only parties who must be cited and made defendants, are those by whom the intervenor has been divested of what he considers to be a legitimate possession.

The court erred in excluding the evidence tendered to sustain the intervention, but did not err in dismissing the intervenor's claim for damages against Gerson and the sheriff. An intervention is a separate, independent demand, limited to the prosecution of a party's interest in a suit pending between other persons, and as to some matter involved in said suit: as a necessity, it must be instituted wherever the principal action is brought, and—except in a case of trespass on real estate—a claim for damages can not be grafted on an intervention, against one who does not reside in the parish where the principal action is pending.

Gerson is a resident of the parish of Ouachita, and—if he has incurred any liability towards the intervenor, there and not in Richland the latter must sue to enforce the presumed liability. As to the sheriff, he was not a party in the original case, and could have been cited in this but as the executive officer of the court under whose orders he acted, and the well-established rule is that the intervenor must enter and take the case as he finds it. He could not, in this proceeding which is not one of final process, properly have coupled with his demand for the recognition of his title to personal property, a demand for damages against the sheriff. In so doing, he added two suits against different

parties in and to the suit which was already progressing between plaintiff and defendant. If allowed, such a practice would be attended with the most inextricable confusion.

It is, therefore, ordered, adjudged and decreed that—so far only as it dismisses the intervention of Joseph F. Jamar, and commands the sale of the property which he claims, the judgment appealed from is annulled, avoided and reversed at the costs of Henry Gerson junior; and that—as concerns this branch of the litigation, this case be remanded to the lower court to be proceeded with according to the views herein expressed and according to law.

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No. 830.

J. H. V. HARRINGTON VS. IRA BARFIELD ET AL.

The district court has jurisdiction of a suit brought by one heir against his co-heirs for his share of the succession, which has been administered, and is at an end.

The child born after one hundred and eighty days after marriage is presumed to be the husband's child.

A child begotten of a mother who had married in good faith, and before any doubt had arisen in her mind as to the existence of any legal impediment to her marriage, is entitled to all the rights of a legitimate heir of the mother.

Heirs are not chargeable with the rents and revenues of the property which they have possessed and used as sole heirs in good faith, before notice was brought to them of the existence of another heir, previously not heard of.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*M. J. Liddell and Robert Ray* for plaintiff and appellee.

*W. W. Farmer and Wells & Potts* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. Levi and Margaret Barfield, husband and wife, were living in 1850 in Franklin parish, upon a plantation of their own, surrounded by the appliances of comfort, and even of luxury, that befitted persons who by patient toil and prudent management had obtained the means to procure them. Three children had survived of the larger number that was born to them—Celia, Isabel, and Ira. In that year, a young man named Harrington came into that neighbourhood, and sought to obtain the patronage of parents in the establishment of a school. He found encouragement, and the unwary father of Celia permitted him to open a school at his house or on his premises. Harrington had a fair exterior, and plausible address, and possessed an accomplishment which in the rough life of a sparsely settled and imperfectly cleared country

such as that locality then was, gave him the *entrée* to society, and made him the visitor, more desired than all others, to the country dances and social gatherings of the neighbourhood. He was a musician, and his instrument was the violin.

Celia Barfield was then in the first bloom of mature womanhood. Whether any thing had transpired to awaken her father's suspicions, we have now no means of positively knowing, but Harrington left Mr. Barfield's, and went to another place, not far distant, and opened another school. There is little doubt that the father had discovered his mistake in permitting this attractive adventurer to live under his own roof, and sought to repair the probable injury by sending him away. Not many months elapsed before he had to bemoan the effects of his fatal error.

In April 1851 there was a festive gathering in the neighbourhood. Celia Barfield left the house of her parents, bedecked for the evening's sport. They never saw her again. Harrington met her at the dance, and the two thence rode away, and were married by a justice of the peace. They were attended by those to whom their secret intentions had been made known, and among them was an uncle by marriage of the infatuated girl, who has lived to tell on this trial the story of his niece's dishonour, and his own shame.

About two months after the marriage, Harrington was charged with shooting at a man for some cause, and was arrested and examined before a magistrate, and discharged. This circumstance occasioned the usual flood of eager small-talk in a country neighbourhood, and among it, was the whisper—appalling to the Barfields and their daughter—that Harrington had a living wife in Mississippi then. This was spoken of as a rumour, but there was no one then who undertook to assert it. Harrington determined to move away. He left in July, giving as a reason his fear that the man who had him arrested for the alleged shooting would have him indicted. Celia had worn the name of wife two and a half months, and was already sufficiently advanced in pregnancy to attract notice. This rumour of Harrington's previous marriage, and of his living wife, reached her ears. She asked him about its truth. He denied that his first wife was living. He had represented himself as a widower on his first appearance there. He asseverated that his first wife was dead, and she believed him. It is strange, she said, that every one knew that Mr. Harrington had another living wife, now that she was married to him, and had not found it out before. She declared her disbelief in the story, and went with him to his new home. That was Magnolia, in Arkansas.

In 1875 another stranger appeared in this same locality, bearing the same family name, with the baptismal prefixes of that uncle's name, who had assisted in the elopement of twenty-four years before. He

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Harrington vs. Barfield.

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said he was the eldest and only surviving child of the school-teacher and Celia Barfield—the same that she bore in her womb when she left the place to which he had now come for the first time. Many changes had taken place. Levi Barfield had been dead many years. Margaret, his widow, had husbanded the property with unusual success—had increased it, so that the plantation of twelve hundred acres, and the movable property, and slaves, had become valuable. She survived the war, and though the estate of course suffered great deterioration, when she died on the last day of 1870, there was enough to satisfy moderate wants.

Ira Barfield, her only son, and Isabel, her daughter, now the wife of John M. Gwinn, took possession of the property, formally accepted the succession unconditionally in January 1871, and in the following December partitioned it between themselves. Each was in the enjoyment of the one half of the property of their father and mother, when this stranger, claiming to be the son of their sister, appeared on the scene. He had been in this State two or three years, but did not know in what particular part of it his mother's family lived. His father had found a third wife in Arkansas, after Celia Barfield's death, and this last wife was a widow with a daughter by a previous marriage, who had grown up, married, and come down to the neighbourhood, and it was from her that he had found out where the Barfields lived. His mother's death had occurred a few years after the removal to Arkansas. His father had told him his mother's name, and that he would be entitled to some property in Louisiana at some future day, but he knew nothing more. He was very young, hardly old enough to be told or to remember any thing but such salient facts as his mother's name and birthplace. The father himself had died before he imparted his singular story to the son. The war had broken out, and William Harrington in some measure atoned for his violation of the laws of his country by flying to her defence. He perished, a victim to the fevers of the camp at Corinth.

Young Harrington told his story to Ira Barfield, who listened with half-yielding credulity, but warned him that better proof was needed than his narrative, however probable, before he could be recognised as Celia's son, or as such, be entitled to Celia's inheritance. Isabel scouted his whole story. He was an impostor, not the son of her sister—but even if he were, he was conceived in shame, born in disgrace, and was now flouting the pretensions of an adulterous bastard to share the Barfield property in the faces of those whom his mother had dishonoured. The reception which this brother and sister gave to the son of the dead woman is characteristic.

Both the exception and answer of Mrs. Gwinn contest the pretensions of the plaintiff on these grounds, and the other defendants adopt

her defences as their own. There are also other grounds of exception;—that Harrington is suing for recognition as heir, and for the partition of succession property, and that the parish court has exclusive jurisdiction of these questions, being probate in their nature.

It was said in *Le Page v. N. O. Gas Co.* 7 Rob. 183, that the recognition of an heir before the probate court is required only when he is seeking to compel an executor or other representative of a succession to render an account. When he is demanding his share of the succession from other heirs, and his heirship is contested, he can as well offer the proofs of that heirship in a suit in the district court as in the probate tribunal. A circuitry and multiplicity of actions is avoided by that means. The second exception is equally untenable. This is a petitory action, coupled with a demand for the value of movables, and for rents and profits. The succession of the deceased Barfields had ended some years before the institution of this suit, and was no longer in existence to be partitioned.

The heirship of the plaintiff is put at issue by the defendants. They deny that he is their sister's child, or if he is, that his parents were legally married. They aver that William Harrington had a wife then and now living, whose name is Matilda J. Kelly, and that Celia Barfield knew it when she went through the mock ceremony—that the flight to Arkansas was because of a threatened prosecution of Harrington for bigamy, and the birth of three children, of whom plaintiff is the only survivor, shews their mother's persistence in the illicit cohabitation with Harrington after she knew that she was not his lawful wife. They allege that the plaintiff is an adulterous bastard, and cannot lay claim to the inheritance of their parents.

The whole controversy turns upon the good or bad faith of Celia Barfield—upon her knowledge or ignorance of the previous marriage of Harrington at the time of her own marriage, and of the conception of this, her first child. It is necessary therefore to examine the law applicable to this question, and then to ascertain whether she was in such a position, as to enable her son to legally claim her portion of her parents' property.

The marriage was in April 1851. The plaintiff was born on 9th. December of the same year, between seven and eight months after the marriage. Our Code declares that the child which is born before the one hundred and eightieth day after the marriage, and which is capable of living, is not presumed to be the child of the husband. The same rule applies to the child born three hundred days after the dissolution of the marriage. arts. 205–6. new nos. 186–7. The plaintiff was born within those periods, and we will charitably assume, as the law does, that he was begotten in wedlock.



To what extent the good faith of one of the parties will cause a null marriage to produce civil effects, and what is the reasonable belief that party must have of the absence of legal impediments, is thus stated by Marcadé ;—

les principes de l'équité, et la théorie juridique, et l'historique de la rédaction du Code, tout prouve que tous les mariages nul, c'est-à-dire, ceux proprement nuls *ab initio*, aussi bien que ceux rendus nuls par la cassation, doivent produire les effets civils d'un mariage valable, quand il y a eu bonne foi.

C'est sous la condition de la bonne foi des époux, ou de l'un d'eux, que le mariage nul produit les effets civils ; et cette condition est la seule qu'exige la loi. Cette bonne foi consiste dans la pensée, erronée mais raisonnable, chez la personne, que le mariage qu'elle contractait était vraiment valable devant la loi.

Nous disons *pensée raisonnable*. Ainsi, on ne pourrait pas reconnaître la bonne foi, l'ignorance pardonnable, chez celui qui viendrait dire qu'il ne savait pas qu'un même homme ne peut pas avoir plusieurs femmes ; \* \* \* En effet, on sait partout dans le monde que la bigamie est punie comme un crime \* \* \* Ce qu'il faut toujours exiger, mais aussi l'unique chose qu'on doit exiger, c'est l'ignorance vraiment pardonnable de l'existence ou de l'effet légal du fait qui s'opposait à la validité ou à la formation du mariage ; c'est pour répéter la règle deux fois exprimée, qu'il y ait en BONNE FOI. Tout se réduit à cela ; et comme c'est là un point de fait qui dépend, pour chaque espèce, des milles circonstances de l'espèce, nous ne concevons guère l'attitude des cent et une questions que les auteurs ont agitées sur ce point. Il est abandonné tout entier au pouvoir discrétionnaire du juge. *Explic. du Code Napoléon*, 1 vol. 520.

Clendenning's case, 3 New Series, 438, declares the broad doctrine that the woman who was deceived by a man who represented himself as single, and his children begot of her while the deception lasted, are *bona fide* wife and children, and as such, entitled to all the rights of a legitimate wife and issue. It should be stated however that a marriage had preceded the birth of a child in that case, as in this, the first wife being still living, and the first child was born within four months from its celebration, which circumstance Martin, J., treating of the good faith of the woman, thinks may be evidence of too much faith in her, but adds, as a lawful marriage cures an irregularity of that kind, a *bona fide* one on the part of the deceived woman must have the same effect.

Patton v. Philadelphia, 1 Annual 98, is a remarkable case, where the questions now before us, were well considered. Abraham Morehouse left Abigail Young, his lawful wife, whom he had married in 1790 in New York, and their two children, and came to the Spanish colony of Louisi-

ana. He said he was a widower, and in 1799 agreed to take Elénore Hook as his wife. There was no priest to be had, and the two signed an Act before the commandant of the post, in which their intention was expressed. That was the custom of the colony. In 1805, Morehouse acquired four tenths of the land grant of twelve leagues square, made by the Spanish Government to the Baron de Bastrop, and died in 1813, his two wives being then alive, and each one having living children by him. The parties to the suit derived title from these two families—the plaintiffs from Elénore Hook's children, the defendants from Abigail Young's, through Stephen Girard.

Morehouse had refused to solemnize his marriage afterwards when a priest was at hand, and the court held that it was valid without the solemnization, and that Elénore was his lawful wife as long as she remained in good faith, and cite the Spanish law to the effect, that absolute ignorance of the existence of the impediment to a lawful marriage is not essential, but children, begotten during the existence of a doubt touching the impediment, will be legitimate.

There were general reports current in the country in relation to the first wife being alive, and Elénore once asked the commandant's wife about them, and was told not to believe them. Celia Barfield was told by her husband the same thing under very similar circumstances, but the defendants insist that she knew of his first marriage and the living wife, before her own marriage. The most damaging testimony to Celia is their witness, Mrs. Evans, her aunt, who lived in the Barfield neighbourhood, and who says ; she "had heard that Harrington was a married man before this marriage with Celia, and that she had told Celia of the rumour before she ran away with him—that she had heard Celia's father and mother tell her (Celia) that Harrington was a married man, and that Celia had heard it more than once before her own marriage with him."

On the other hand, two men who were conspicuous actors in the elopement testified that there were no rumours in the neighbourhood of any living wife of Harrington, and that no one, so far as they knew, suspected or had reason to suspect that Harrington was not a widower as he represented himself to be. Lucien H. Villard, the uncle by marriage of Celia, protests that he would not have assisted his niece to the marriage had he suspected or heard of such a thing, but we can very well be distrustful of a man's notions of propriety who confesses himself to have been so unmindful of decency and good feeling, as to help in bringing upon his wife's sister and household the anguish and the shame which their daughter's flight could not fail to do. Dyson, now the patriarch of the neighbourhood, who also lent a helping hand on the elopement night, says he would certainly have heard the rumour of

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Harrington vs. Barfield.

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Harrington's having a living wife, if there had been any such rumour, but there was none. Moses Evans is the husband of that aunt, whose strong reiterations of Celia's previous knowledge of the first wife's existence we have mentioned. He knew Harrington well, and lived near the Barfields. He says there was never any report in the neighbourhood about his having another living wife until about a month or so after the marriage. It is not credible that Mrs. Evans had heard such report and never told her husband. Such an appetizing piece of gossip could not have been kept to herself. The good woman has confounded the time, as it is natural she should, and that her memory is not to be trusted is conclusively demonstrated by the statement she made, a short time before this suit was filed, to one of the attorneys that Celia Barfield would never have married Harrington if she had known he was already a married man. Five other witnesses corroborate these as to the absence of any rumour of Harrington's living wife before his marriage with Celia. It was not long after that event that the rumour became rife, and it soon developed into certainty.

Levi Barfield, the stricken father, had already determined to free his mind from any harassing doubts upon this matter, and had sent Moses Evans' father over to Mississippi to learn the truth. He found the first wife, Matilda Kelly. Then Mr. Barfield went, and assurance was made doubly sure. Then it was that Mr. Barfield sent the female members of his family as emissaries to his daughter, to tell her the appalling truth he had learned, and to conjure her to quit the man who had so foully betrayed her, and come back to the home she had so inconsiderately left. Her answer was—"I will follow William Harrington never mind how many wives they say he has." She could have said nothing else, even if she believed what they had told her. What could she do but cling to the father of the unborn child, whose advent might throw suspicion on her ante-nuptial virginity. She best knew whether that child might be expected to see the light before the usual period of gestation had elapsed from the marriage. But there is every reason to suppose that she did not believe the story about the first wife then, and that her exclamation that she would follow Harrington was only the outburst of angry defiance of her tormentors. Naturally she would ask herself—how is it possible for this Matilda Kelly to be his wife, when she does not bestir herself to pursue him. She would not have far to come. She knows where the second wife is, and how can it be conceived that she can deny herself the revenge, and spare him the punishment, of personally confronting the guilty husband, and by her presence placing an insurmountable barrier between him and the hapless girl whom he has vainly sought to put in her place.

Marcadé says, c'est seulement au moment de la célébration du

mariage que la bonne foi est nécessaire, et alors même que les époux seraient restés unis longtemps encore après la découverte de l'erreur, cette bonne foi primitive suffirait et produirait les mêmes effets que si elle avait continué jusqu'à la déclaration de nullité. La loi devait être indulgente en pareil cas. *Explication, Ibid.* 521.

But the testimony leaves the impression on our minds that Celia never believed the story that was told her, and the death of all the children but the plaintiff leaves no question for consideration but her good faith at and before the time this plaintiff was conceived.

We think her good faith is proved far beyond the requirement of the law as approved by this court in Morehouse's case. If children begotten during the existence of a doubt as to any impediment, and before doubt has given place to certitude, are held to be entitled to the rights of legitimate heirs, *a fortiori* must this child who was conceived before doubt began, be held entitled to the same rights. It is not improbable that Celia Barfield continued in disbelief of this story in Arkansas. No one troubled himself about it. No one pursued him, and so ignorant was the community there of it, that after her death he married there a third wife, who is living and is one of the witnesses to the filiation of the plaintiff on this trial. Two of this man's wives have survived him.

The plaintiff's counsel say : It is not an insignificant circumstance that Levi and Margaret Barfield both died without disinheriting Celia. If they had believed, or had reason to suspect that she knew of Harrington's first wife when she married him, they would not have left their other children to the uncertainty of being confronted by her issue, claiming a right to their property. But the probability is that neither of these people thought of wills or disinheritance, or knew anything about the law regulating the rights of Celia's children. Their simple way of looking at it was from the moral standpoint, and no doubt they thought a man that had one wife could not, outside of a Mohammedan country, have another in law, and any children born of such other wife were bastards, and were in the expressive language of the old law, the children of nobody.

As good faith is imputed to the mother of the plaintiff, until the contrary be clearly shewn, so must it be imputed to Ira Barfield and his sister Isabel in their possession of the property under the belief that no other heir was in existence. There was nothing to induce them to believe that any one was in existence who could rightly claim any portion of their parents' succession but themselves. They knew nothing of Celia's subsequent history, and Celia's son knew so little of them that it was many years before he found out the locality of his mother's marriage, and the home of her family. Celia had not been heard of by her

## Harrington vs. Barfield.

family for nearly a quarter of a century, and her brother and sister are entitled to the benefit of their plea of prescription. The defendants are not chargeable with the rents and revenues of the property which they possessed and used as sole heirs in good faith, before notice was brought home to them of the existence of an heir, previously not heard of. This suit was instituted in the latter part of 1875. The verdict of the jury gave the plaintiff the rents only for 1876 and 1877. They found in his favour as heir, and awarded him one third of the property, and we think correctly. Therefore

It is ordered and decreed that the judgment of the lower court is affirmed.

## No. 831.

## FRANKLIN GARRETT, EXECUTOR, vs. WILLIAM BONNER.

Any suit between a citizen of this and another State, whether *in rem*, or *in personam*, is under the act of Congress of 1875 removable from the State to the Federal court, when the matter in dispute exceeds \$500, and when the application to remove is made at, or before the term of the State court at which the suit could be first tried, and before the trial thereof.

An hypothecary action against a third possessor of mortgaged property who was not a party to the previous suit and judgment of the plaintiff against the former owner of the property is a new suit, and not the mere continuation of the previous suit.

Appearing and filing a plea of prescription in the State court, does not, under the act of Congress of 1875 prevent the defendant from demanding a removal of the suit to the Federal court.

When a defendant has filed the proper application and bond for the removal of the suit to the Federal court, in a case where he had the legal right to the removal, the jurisdiction of the Federal court will not be affected by the subsequent death of the defendant, and the execution of the appeal bond by his executor.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*Franklin Garrett* for plaintiff and appellee.

*W. W. Farmer* for defendant and appellant.

The opinion of the court was delivered by

**SPENCER, J.** This is a hypothecary action to compel the defendant to pay the amount of a judgment for \$5253 75 and interest, or deliver up the property in his possession to be sold to satisfy it. The petition alleging that Bonner was an absentee, a curator *ad hoc* was appointed to represent him. The plaintiff is a citizen of Louisiana, and the defendant a citizen of Alabama. The petition was filed April 12, 1876, and citation served April 14, 1876, on the *curator ad hoc*. The next term of the court, after the filing and service of this suit, began on Monday of September following. On twenty-fifth of September, 1876, the defendant appeared by counsel and filed a plea of prescription. On the

next day, September 26, he filed, in the usual form, his petition and bond for removal of said cause to the Circuit Court of the United States, under the statute of 1875. The court refused to grant the order, although there was proof that the value of the lands sought to be held liable to plaintiff's mortgage exceeded \$500, etc. The reasons of the judge *a quo* are not given; but it is argued here, in support of the refusal to transfer—

First—That this is an action *in rem*, and that the act of Congress only applies to actions *in personam*.

Second—That the hypothecary action in this case is not a new suit, but in the nature of an auxiliary proceeding for execution of the original judgment of Garrett vs. Sims.

Third—That by pleading prescription before filing petition for removal defendant voluntarily admitted jurisdiction in the State court.

We do not think either of these objections sufficient. The act of 1875 has extended the jurisdiction of the Federal courts up to the limits of the Federal constitution. It provides in substance that any suit of a civil nature at law or in equity, when the matter in controversy exceeds \$500, etc., is pending between citizens of different States, it may be removed on application of either party made *at or before the term* at which said suit could be first tried and before trial thereof. The act does not distinguish between actions *in rem* and *in personam*. It says "*any suit of a civil nature, at law or in equity.*" It can hardly be affirmed that a demand, like that in this suit, to compel the defendant to pay a sum of more than \$5000, or to surrender property exceeding \$500 in value, is not a civil suit. We are not prepared to say that it is purely an action *in rem* even. It is a *real* action, but partakes of the nature also of a personal one, since its prayer is alternative.

Nor can it be affirmed that this is not a new suit, but only a continuation of a former one. The defendant Bonner was never a party to the suit of Garrett vs. Sims, upon the judgment in which this proceeding is based.

The plaintiff's third proposition would be good if this removal were sought under the judiciary act of 1789. The authorities cited from 12 M. 100 and 1 N. S. 546 relate to that act.

If the conditions required by the act of 1875 exist, the removal must be ordered if applied for *before trial* and *at or before the first term* at which the cause might have been tried. This was done in this case, and the removal should have been ordered.

It is therefore ordered and decreed that the judgment in this case be set aside, and that the case be remanded to the court *a quo* with instructions to grant the removal prayed for by defendant, upon his complying with the law.

No. 805.

JOHN CHAFFE &amp; BRO. VS. JOSEPH MORGAN. J. P. SHULTZ, INTERVENOR.

A party who in one suit set up a title of ownership to certain property, is not thereby estopped from afterward claiming mortgage rights on the property, as against one who in the former suit denied, and contested his title as owner, and who was in no way injured, or induced to change his position by the claim of ownership set up in the former suit.

The setting aside, for any cause, of the sale of an immovable made by a debtor to his creditor who had a mortgage on the immovable, will not impair any legal rights on the property which the creditor had in virtue of his mortgage.

The reasons given by the court for its judgment in a particular case form no part of the judgment, and hence can not be invoked as *res adjudicata* in a subsequent suit between the same parties.

Inscriptions of mortgage can only be erased by the consent of the parties to the mortgage, or by the effect of a decree to which the mortgagee is a party.

**A** PPEAL from the Eighteenth Judicial District Court, parish of Webster. *Turner, J.*

*George & Taylor* for plaintiffs and appellants.

*L. B. Watkins* for intervenor and appellee.

The opinion of the court was delivered by

EGAN, J. On the third of November, 1869, the defendant, Morgan, obtained from plaintiffs, commission merchants in New Orleans, five thousand five hundred dollars, and executed his promissory note in their favor for the amount, due one year after date, with eight per cent interest from date. On the twentieth of May, 1870, he executed in plaintiffs' favor a mortgage by public act upon certain lands in Bienville parish to secure the debt. This mortgage was duly recorded on the sixth of June, 1870. The debt being still unpaid on the twelfth and thirteenth of June, 1872, Morgan conveyed to the plaintiffs the mortgaged property by two separate acts and took from them a receipt for fifty-five hundred dollars on account of the mortgage debt. On the twentieth of August, 1872, seven or eight days after these conveyances, Shultz, the present intervenor, sued the defendant and attached the lands embraced in the conveyances to plaintiffs, alleging that the defendant *was about* to dispose of a large part of his property to defraud his creditors and to give an unfair preference to some of them. Chaffe & Brother intervened, claiming the property *as owners* by virtue of their said titles and possession under them. Shultz answered the intervention that the titles set up by Chaffe & Brother were not sales for a contemporaneous price, but really *dations en paiement*, the consideration of which was an old debt to the intervenors, due by Morgan, who was insolvent; that the same were intended to give Chaffe & Brother an unfair preference; and that there was no actual delivery of the property conveyed, wherefore the titles were void and without effect. He also

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46	230

30	1307
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1123	797

set up knowledge of Morgan's insolvency in the intervenors. Upon these issues the case was tried. It resulted in a judgment in the court below in favor of Shultz, maintaining his attachment and rejecting the demand of the intervenors. This judgment was affirmed on appeal. Subsequently the lands were sold under the Shultz judgment and bought in by him for largely less than the amount of the Chaffe mortgage, which, however, had meanwhile, on the seventeenth of May, 1876, nearly a year after the judgment of the Supreme Court, been canceled and erased, as shown by the certificate of the parish recorder, at the instance of Shultz's attorney upon the production to him of the written receipt given by Chaffe & Brother to Morgan at the time and in consideration of the before-mentioned conveyances, which, as we have seen, had been finally decreed void and without effect. The present suit was thereupon instituted by Chaffe & Brother against Morgan to enforce their debt and mortgage against the land covered by it; and Shultz in turn intervened, claiming ownership of the lands by virtue of his purchase at sheriff's sale under his own judgment in the former case, which he pleads as *res adjudicata* as to all the claims set up by Chaffe & Bro. in the present case, and that plaintiffs' mortgage was decreed in the former case to have been given in fraud and to be null and void. He furthermore pleaded as an *estoppel* against Chaffe & Brother, the before-mentioned receipt, and the proceedings in said case, and the deeds or acts of conveyance from Morgan therein set up by them in support of their claim of ownership therein asserted, which though pronounced void as to him, were and are valid as to Chaffe & Brother for the purposes of the estoppel. He furthermore sets up the cancellation of the mortgage by the recorder on the production to him of the receipt given by Chaffe to Morgan at the time and in consideration of the before-mentioned conveyances. Wherefore he prays that the demands of Chaffe & Brother in the present case be rejected, and that he be quieted in his title and possession of the lands in question, and further pleaded five years prescription against plaintiffs' note. Upon these issues the case was tried below, the plea of *res adjudicata* having been by counsel referred to the merits. There was judgment in favor of the intervenor, quieting him in his title and possession of the land and rejecting the demand of plaintiffs as to their mortgage, but at the same time decreeing in their favor against Morgan personally the recovery of the full amount of their debt and interest as claimed. From this judgment the plaintiffs alone have appealed.

As to the pleas of *res adjudicata* and estoppel set up by Shultz versus the assertion of Chaffe's mortgage in the present suit, a reference to the pleadings and issues made in the former suit of Shultz vs. Morgan, Chaffe & Brother, intervenors, as already stated in this opinion, will



show that the only issue tendered by Chaffe & Brother was their title to the property seized, and that the validity and legal effect as such of the instruments relied upon by them in proof of title was expressly denied by Shultz. Here then was, to say the least of it, estoppel against estoppel, which, according to the law writers, leaves the matter at large, *i. e.*, the one offsets the other. In *Abbott vs. Wilbur*, 22 An. 368, it was correctly announced that estoppels are not barred in the law, for the object of the administration of justice is to discover and apply the truth, and it is only where one has asserted in some judicial or other proceeding what is false, to his own advantage or the injury of another, that he will be estopped from showing the truth. The same principle is recognized by all the elementary writers. See *Phillips on Evidence*, vol. 1, sec. 378; *Greenleaf's Evidence*, vol. 1, sec. 204 and note; *Bigelow on Estoppel*, p. 293, Nos. 4 and 5.

It is manifest that Shultz was in no way injured or induced to change his position for the sum by Chaffe's assertion of title. It is however well settled that estoppels can not be set up against law, and our own Civil Code, art. 1982, expressly provides that even where both parties to a contract set aside as having been made in fraud of creditors, are adjudged to have been in fraud, and the only consideration was a sum due from the debtor to the party with whom he contracted, the parties shall be placed in the same situation in which they were before the contract complained of was made. *A fortiori* then must this be true where, as was adjudged at the instance of Shultz himself, the *datation en paiement* through which alone Chaffe claimed title was adjudged incomplete and inoperative for want of actual delivery of the property.

In *Judice vs. Kerr*, 8 An. 462, a creditor sued to set aside as fraudulent and simulated a sale by the husband to the wife, who joined issue and claimed title. The sale was set aside as fraudulent and void, but the right of the wife to assert her legal mortgage on the property was reserved to her. In *Wilson vs. Curtis*, 13 An. 601, where the title to property seized by the creditors of the vendor was decreed to be fraudulent and void in a suit to which the vendor was a party, it was held that the judgment was *res adjudicata* as to the vendor's claim of title, but not as to his other claims upon the property; and that if he have any other right or privilege upon the property he should have an opportunity of showing it. In *Millaudon vs. Allard*, 2 La. 551, this court held that "the purchase of land can not have the effect of destroying the mortgage claim of the creditor unless the title passes to him," as it was expressly adjudged and shown it did not to Chaffe & Brother in this instance, in which the real nature of the transaction has been clearly shown. See, also, 1 *Greenleaf*, sec. 211 and 212.

We agree with Mr. Justice Slidell in the case of Gridley vs. Conner, that "it is very true a man can not at the same time be mortgagee and owner of land, but it does not follow that the assertion of one right estops the subsequent assertion of the other," and that in that case there was "*no res judicata* and *no estoppel*." In Bowman vs. McElroy & Bradford, 14 An. 504, the court refused Bowman's claim of title, but reserved to him his mortgage rights upon the slaves in controversy.

In point of fact the mortgage executed by Morgan in favor of Chaffe & Brother was not otherwise involved in the former suit than for the purpose of showing Morgan to be liable to attachment by reason thereof, and it is quite evident under the well-settled jurisprudence of this State that had possession followed the execution of the titles to Chaffe & Brother the attachment of the particular land conveyed would have fallen, and the plaintiff, Shultz, would have been put to his direct revocatory action. This necessity exists in all cases where the transaction or contract, whatever its form, is real and complete, however fraudulent and liable to be annulled it may be. So it was with the mortgage of Chaffe & Brother, the reference to which in the opinion of the court in the case of Shultz vs. Morgan, Chaffe & Brother, intervenors, by no means concluded the latter's mortgage rights, which, as we have seen, were reinstated to the same position they held before by the effect of the decree declaring the nullity of their title. It is true that the parties might have waived the revocatory action and tried the validity and effect of the mortgage in the same action had they chosen to do so, as they did not. On the one hand, Chaffe & Brother neither asserted nor sought to enforce their mortgage, but relied upon and put in issue their title only in the former case, while on the other, the answer of Shultz to their intervention neither alleged nor prayed for its nullity or avoidance to be decreed, and the court did not so decree. As before remarked, what was said in the opinion of the court in that case in regard to the mortgage forms no part of the decree, and can only be properly interpreted as one of the reasons of the court for sustaining Shultz's attachment, which might well subsist even with the mortgage in full force. The reasons for judgment may and often do serve to interpret it and to explain any ambiguity, but it has often, and properly, been held that the thing adjudged will be found not in the opinion but in the decree rendered. See 10 An. 261, 640; 12 An. 736. In Davidson vs. Carroll, Hoy & Co., 23 An. 108, the court said: "The reasons given by the court for judgment form no part of the judgment itself, and the judge of the lower court is not bound by the expressions used by the Supreme Court outside of the decree," to which we will add, for fear of misapprehension, unless it be in some matter of instructions how to proceed on some point expressly ruled by this court, which then must be obeyed as the thing adjudged.

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Chaffe & Bro. vs. Morgan.

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The deeds and receipt of Chaffe to Morgan were not only subject to explanation but have been fully explained, and were at the termination of the former suit without consideration or *legal effect*, not only as between Chaffe & Brother and Morgan, but as to Shultz, the other party to that litigation, also, and should have been so held as to Shultz as they were as to Morgan in the present case by the district judge. That case was decided on appeal finally in July, 1875, and yet, notwithstanding his full knowledge and notice of all the facts, we find Shultz, through his attorney, on the seventeenth of May, 1876, presenting to the recorder the old and effete receipt of Chaffe to Morgan, and, without the knowledge or consent of the mortgagee, demanding and procuring the cancellation and erasure of the Chaffe mortgage on the lands in question, and then proceeding to effect a sale of them under *feri facias*, at which he became himself the purchaser, or rather obtained a sheriff's deed, regardless of the mortgage and of the fact, as we have before said, that the legal effect of the decree in the former case, to which he himself was so prominent a party, was to restore Chaffe & Brother to the same position they occupied, and the same rights, whatever they were, which they had before the acceptance of title from Morgan. This was a short process to get rid of the Chaffe mortgage, which, whether liable to be attacked for actual or constructive fraud or not could not be thus summarily disposed of.

Inscriptions of mortgage can only be erased by consent of the parties to the mortgage, or by the effect of a decree in a proceeding to which the mortgagee is a party. See 21 An. 401 and cases cited; R. C. C. art. 3371 *et seq.* The manner in which this erasure is authorized and procurable is pointed out in the same provisions of the Code in section two, under the head of mortgages, and especially articles 3374 and 3375. Another and very different statute and rule prevails where a third person and not the mortgagor seeks *ex parte* the cancellation or erasure, as for instance in case of the prescription of the mortgage. See R. S. 1870. sec. —. This *ex parte* cancellation, without the knowledge or consent of Chaffe, was clearly in violation of law and of their rights, and without legal effect, and can not be recognized by this court. It follows of necessity that as the price bid by Shultz at the sheriff's sale was greatly below the amount of the special mortgage on the land he acquired no title. See C. P. 684; 1 H. D. 62 and 81, and cases cited.

There only remains the intervenor's plea of prescription to the mortgage note and debt, of which it is only necessary to say that the receipt of Chaffe to Morgan, offered by intervenor himself, and the acts of conveyance for account of the debt, besides the parol testimony of Morgan's acknowledgment of its continued existence, are conclusive against the plea.

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Chaffe & Bro. vs. Morgan.

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The points raised in the two bills of exception of plaintiffs' counsel have already been sufficiently considered and disposed of in this opinion, and need not be further discussed.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be and it is avoided and reversed, except in so far as it decrees a recovery personally against the defendant, Morgan, in which respect alone it is affirmed; and it is now decreed that the attempted cancellation of the mortgage of Morgan to John Chaffe & Brother on the seventeenth of May, 1876, be and it is declared null and void and of no effect in law; that said mortgage be declared to be still in existence and operation against the lands covered by it; that the pretended sheriff's sales under *feri facias*, issued in the case of J. P. Shultz vs. Joseph Morgan, John Chaffe & Brother, intervenors, No. 28 of the district court of Webster parish, of the lands embraced in said mortgage, be and they are, as well as all deeds and titles under them, declared illegal, null, and void. It is further ordered and adjudged that the right of Shultz and his succession and heirs, if any such they have, to sue for and procure the annulment of the said mortgage in favor of John Chaffe & Brother for any legal cause affecting the same in the manner and subject to the rules applicable to such actions, be and it is reserved. It is further ordered and adjudged that this case be and it is remanded to the court below, to be there proceeded with according to law and the principles of this opinion, and that the succession of J. P. Shultz pay the costs of this appeal.

Rehearing refused.

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No. 798.

J. A. & E. A. MORRIS vs. J. W. WOMBLE, SHERIFF.

Although it is proper that proceedings for a mandamus should be taken in the name of the State, yet the absence of that form will not be fatal, when the facts set forth in the petition disclose a right to the writ, and there was a proper prayer for it.

Where a debtor has specially mortgaged his whole plantation, as a unit, he can not demand that it shall be sold in parts. The creditor may compel the sheriff to sell it as a whole, and in block.

**A** PPEAL from the Twelfth Judicial District Court, parish of Franklin.  
*Smith, J.*

*Richardson & Boatner* for plaintiffs and appellees.

*A. W. Moore* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs having obtained judgment against R. E. Brannin for several thousand dollars with recognition of a special mort-

gage (of date 1874) on the undivided three fourths of the "Bayou Macon plantation," with all the buildings and improvements thereon, and containing 3530 acres, more or less, took execution, directing the sheriff to seize and sell said plantation *in block* and as an entirety. The sheriff proceeded to advertise said property for sale in lots of not less than ten nor more than fifty acres, in disregard of plaintiffs' instructions. Thereupon this rule was taken by plaintiffs on the sheriff to show cause why a mandamus should not issue to compel him to sell said plantation in block. The sheriff, in answer to the rule, excepts that the proceeding is irregular, in that it is not taken in the name of the State. This objection is fully met by the case of *Malain et al. vs. Judge of the Third Judicial District et al.*, 29 An. 793, where we held in effect that while it was usual and proper that proceedings for mandamus should be taken in the name of the State, yet the absence of that form in the petition would not be fatal if the state of facts set out disclosed a right to the writ, and there was a proper prayer for it—more especially as if the writ be granted it would issue in the name of the State.

The sheriff further answers that his advertisement of said property for sale in lots as stated was made under instructions from the defendant in execution, who under the constitution and Code of Practice had the right to so direct the sale to be made.

We have frequently held of late (and do not consider the question longer an open one) that article 132 of the constitution was inoperative, except to the extent that its execution is provided for by statute, and that the act No. 32 of 1877 repealed all laws providing the modes of carrying that article into effect.

Hence the mode of selling the "Bayou Macon plantation" in this proceeding must be governed by the general provisions of our law, and not by article 132 of the constitution.

Where the *fi. fa.* issues on an ordinary judgment the debtor undoubtedly has the right to point out the property he desires sold, provided the property pointed out be available and sufficient. C. P. 646. But when the property is specially mortgaged the mortgage creditor "has the right to direct the seizure of the property mortgaged to him." C. P. 648. In the one case and the other it is the duty of the sheriff to *seize and sell* the property so pointed out, whether it be that pointed out by the debtor or the property mortgaged, pointed out by the creditor. If the thing seized, even under an ordinary *fi. fa.*, be indivisible in its nature, as a horse, a house and lot, etc., the sheriff can not sell the debtor's interest in a designated part or portion of that thing. He might, perhaps, with the consent of the parties, sell an aliquot part interest in the whole thing, as a half or a third.

But the case we conceive to be very different where the debt for

which the sale is made bears special mortgage on the thing to be sold, and where the thing has been mortgaged as *an entity, a unit*, and thus made by contract and in contemplation of the parties *indivisible*, whether so by nature or not. See C. C. 2109. "The mortgage," says article 3282 C. C., "is in its nature indivisible, and prevails over all the immovables subject to it, and over each and every portion." We then have, in such case, an *indivisible* right operating upon an *indivisible* thing. This is the idea expressed by this court in 16 L. 163, where it says: "Property specially mortgaged can not be sold to pay part of the debt secured. The mortgage being indivisible in its nature, clings to every portion of the thing;" and again in 10 R. 45, "each and every part of the thing mortgaged is liable for each and every portion of the debt." Thus where a plantation, with its accessories, has been specially mortgaged, the stock, implements, etc., thereto attached by the owner and therefore made immovable by accession, can not be sold separately from the plantation itself, no more than can a house or other building on it.

When the law gives the mortgage creditor the right to seize the whole thing mortgaged it gives him the right to sell the whole thing, if it be indivisible by nature, or only so by the agreement and contract of the parties. In such a case the debtor has not the right of causing the seizure to be reduced as excessive under article ——— C. P., for the reason that by the contract of mortgage he has agreed that the thing is a unit, an entity, and has made it indivisible by agreement, and subjected it to an indivisible right which operates in its full extent upon every part and portion of the thing.

The impracticability of the right claimed by defendant will be made more manifest when we consider it in connection with other provisions of the Code of Practice. Thus, if the thing mortgaged chanced to be encumbered with a special mortgage prior to that under which it is seized, there can be no adjudication unless the price bid exceed the prior mortgage. C. P. 684. So, if the price bid exceed the prior special mortgage, only the surplus is to be paid over by the purchaser. C. P. 706, 718. So, when the sale is to satisfy a mortgage debt partly due and partly not due, the sale must be for cash for the part due and on terms to meet the credit installments.

In the case of the prior mortgage, if the thing mortgaged be sold by piecemeal and to different purchasers, what portion of this prior mortgage will each purchaser assume? What part of that prior mortgage will bear upon each part of the thing thus sold? And what part of his bid will each purchaser pay over as surplus? So in the case of sale to meet due and undue installments, the same difficulties and inextricable confusions would be encountered.

These difficulties are further augmented when, as in this case, the

mortgage debtor only owns an undivided interest in the thing which he has mortgaged. Joint owners can not be said to own any designated individualized material part of the thing subject to the joint right. Thus it has been often held and is now elementary, that one who is a joint heir in a succession can not sell his interest in any particular thing belonging to that succession. So one who is a joint owner of a tract of land can not claim a homestead upon it. The reason in both cases is, that upon liquidation and partition the portion in which he sells his interest or on which he claims his homestead may not fall to him.

We conclude, therefore, that where a debtor has specially mortgaged a plantation as an entirety, a unit, to secure his debt he has rendered it by contract indivisible, and that he can not demand that it be sold in parts and by piecemeal. The creditor has the right to have it sold as a whole, and in block.

The court *a qua* made the mandamus peremptory against the sheriff. The decree is correct, and is affirmed at costs of respondent in both courts.

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No. 843.

WM. M. GILLASPIE, GUARDIAN, vs. CITIZENS' BANK OF LOUISIANA ET AL.

Minors, who are beneficiary heirs, are not entitled to sue for the recovery of any specific property belonging to the succession of which they are heirs, or the rents of the same, but only for the residuum of that succession, after its debts have been paid. But they are entitled to sue to reduce the amount of the debts of the succession, or to bring into the succession any property which belongs to it, and which may be in the possession of, and claimed by others.

Under the charter of the Citizens' Bank of Louisiana married women may become stockholders, and as such may lawfully mortgage their property, and bind themselves conjointly and *in solido* with their husbands. And they may validly renounce their rights on their husbands' property in favor of the bank, when their husbands own its stock.

In order to obtain executory process against property mortgaged to it by a deceased stockholder, it is necessary for the Citizens' Bank, like other mortgage creditors, to serve a notice of the order of seizure and sale on the legal representative of the deceased stockholder's succession, or on his heirs, if they are of age, and have accepted and are in possession of the succession.

**A** PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Parsons, J.*

*Cobb & Gunby* for plaintiff and appellee.

*Armand Pitot* and *W. W. Farmer* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. Dr. Harrison Jordan and his two children, William T. Jordan and Fannie V. Jordan, wife of William M. Gillaspie, owned in equal portions a large quantity of land, then in Morehouse parish, now

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44	330

in Richland, cultivated in cotton, together with some seventy slaves, and the necessary stock and farming implements.

In 1859 Mrs. Gillaspie and her brother gave separate powers of attorney to their father, authorizing him to purchase stock in the Citizens' Bank, and to mortgage their shares in the property as security, and as required by the charter of the bank.

Dr. Jordan purchased of divers persons shares of stock, originally 1000, reduced, in accordance with the amended charter, to 937 shares; and to secure the amount represented by the original stock, \$100,000, and such stock loans as they might be entitled to and obtain, Dr. Jordan, in his own right, and as the agent and representative of Mrs. Gillaspie and William T. Jordan, on the 28th June, 1859, executed a mortgage on their lands, part composing the "Trio" plantation, together with the slaves, stock, implements, etc.

As owners of the stock, Dr. Jordan and his children were entitled to a stock loan of \$28,000, which they obtained, executing a stock bond, jointly and *in solido*, for the amount, renewable annually, according to the terms of the charter.

Of the \$28,000 some \$14,000 were paid to or for the persons from whom Dr. Jordan purchased the stock; and a part, perhaps the whole of the remainder, was put as capital into the firm of Gillaspie, Brewer & Co., commission merchants of New Orleans, established about July, 1859, composed of William M. Gillaspie, James Brewer, and Harrison Jordan. This partnership terminated in March, 1861, and was succeeded by Gillaspie, Jordan & Co., W. T. Jordan taking the place of Brewer.

Mrs. Gillaspie died about June, 1870, leaving two minor children, Fannie T. and William Gillaspie, and their father, William M. Gillaspie, surviving; and Dr. Harrison Jordan died about December, 1871, both he and his daughter intestate.

The domicile of Dr. Jordan and of his children was in Louisiana from 1858 until the death of the daughter and her father. There was no administration of their respective estates. The two children of Mrs. Gillaspie were the heirs of their mother, and they are co-heirs of their uncle, William T. Jordan, in the succession of Dr. Harrison Jordan.

In December, 1871, the Citizens' Bank filed a petition, alleging the indebtedness of Dr. Harrison Jordan, William T. Jordan, and Fannie Virginia Jordan, wife of William M. Gillaspie, in the sum of \$25,000, balance of the stock loan of \$28,000, with ten per cent interest from the first of January, 1863, secured by mortgage and by pledge of the 937 shares of stock; and praying for the seizure and sale of the mortgaged property and pledged stock. No mention is made of the death of Mrs. Gillaspie or of Dr. Jordan; but the petition alleges that William T. Jor-



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Gillaspie vs. Citizens' Bank of Louisiana.

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dan is the actual possessor of the mortgaged plantation, and prays that demand of payment and notice of seizure be served on him. The judge granted the order, and directed that "notice of this order of seizure and sale be given to William T. Jordan, actual possessor of the mortgaged property," which was accordingly done.

The sale was made on the third of February, 1872, and the mortgaged property and the stock were adjudicated to the bank at the price of \$20,000, being two thirds of the appraisement. Pursuant to this adjudication, the sheriff conveyed the property to the bank, with all the rights "which the former owners, Harrison Jordan, Mrs. Fannie Virginia Gillaspie, and William T. Jordan, had in and to said property."

The bank did not take possession; and it seems to have been understood that the parties in interest should redeem the property. In June, 1872, Mrs. Jordan brought suit against her husband for a separation of property, alleging his embarrassment, and that she was a professional teacher when she was married, that she had supported herself, and was still able to do so. Service was accepted, the petition was filed, put at issue, and judgment of separation rendered and signed, all on the same day. The evidence offered was the testimony of a single witness, proving that Mrs. Jordan was a teacher, had taught school at his house, and in his opinion was capable of supporting and providing for herself.

Whatever may have been the intentions of these parties originally, there was an agreement in writing between Jordan and Gillaspie, dated January 14, 1874, that the title to the property sold to the bank in February, 1872, which was purchased by them from the bank after that sale, should be one undivided half to W. T. Jordan, one undivided fourth to Gillaspie, and one undivided fourth to his children, William and Fannie T. Gillaspie.

On the fourth of May, 1875, the Citizens' Bank sold and conveyed to Mrs. Jordan, separate in property from her husband, by judgment, the entire mortgaged property and bank stock, for the sum and price of \$33,987, of which \$8665 in cash, a note to her own order for \$13,322, bearing interest at eight per cent, with the privilege of extending the payment from year to year, on paying the interest, and the sum of \$1903 of the principal, and the remainder, \$12,000, in a stock note, renewable, and bearing ten per cent interest.

William M. Gillaspie having qualified as guardian of his two children in March, 1876, brought this suit in order, as stated:

1st: To annul the sale made by the Citizens' Bank, on the fourth of May, 1875, to Mrs. E. F. Jordan;

2d: To annul the judgment separating Mrs. Jordan and her husband, so far as it may prejudice plaintiff's rights;

3d: To annul the sale made by the sheriff to the bank on the third of February, 1872;

4th : To annul the mortgage of the 28th June, 1859, in favor of the Citizens' Bank, on general grounds applicable to the whole contract and special grounds applicable to the one undivided third of Mrs. Gillaspie in the Trio plantation ;

5th : To have plaintiff, in his capacity of guardian, recover for the minors and obtain possession of one undivided third of the plantation, as heirs of their mother, and one undivided half of one undivided third, as heirs of their grandfather, Harrison Jordan.

The bank excepted that plaintiff was not guardian ; and this was overruled on the production of authentic proof of his appointment as such by the proper court in Mississippi. The bank excepted on other grounds, one of which was that the court was without jurisdiction so far as the demand of plaintiff for rents and for the value of the personal property sold under the mortgage is concerned, the domicile of the bank being in the parish of Orleans ;

2d : Prescription of one, three, four, five, and ten years ;

3d : That the heirs of Mrs. Gillaspie can not maintain an action to recover the property without tendering at least the one third of the debt to the bank for which she was liable *in solido*, viz., \$9333 33 ;

4th : That they can not maintain a suit for the ownership and possession of the property of their ancestor, Harrison Jordan, without paying the debts ;

5th : That out of the bid by the bank, \$20,000, the costs, taxes, and \$19,392 73 of the debt due on the property, were paid, which sums have neither been refunded nor alleged to have been offered ;

6th : That plaintiff does not allege that the minors have accepted the succession of their mother unconditionally, as in fact they have not done.

The bank also answered, giving the entire history of this business, which we have endeavored to condense.

Mrs. Jordan by way of exception alleges the reality of the judgment of separation ; and that it can not be attacked collaterally. She also pleads the prescription of one, two, three, four, and ten years ; and she charges that Gillaspie was well aware of the rendition of said judgment, and took an active interest in having it rendered ; and that his attack on it is in bad faith and fraudulent.

She also alleges that she has reduced the original mortgage by payment of interest and part of the purchase price more than \$12,000 ; and that it is inconsistent and illegal pleading for plaintiff to claim one half the property without first having said mortgage annulled and canceled, or without first tendering to her the one half of the amount which she has paid in reduction of the mortgage.

She also answers, stating the history of her connection with the property ; and concluding with a prayer that in the event of her eviction

she be not turned out of possession until the sum of \$13,218 95, expended by her for taxes and improvements, be re-imbursed, with interest.

William T. Jordan answers at length, alleging advances made to the mother of the minors, and large payments made by him for taxes in 1869, 1870, 1871, for levees, etc., and to the bank, for which he prays for judgment in reconvention.

The judgment of the district court recognized the minors as heirs of their mother and of their grandfather, and decreed them to be owners of one half the property *in indiviso*. It also decreed the nullity of the sale to the bank of February 3, 1872, as well as of the sale by the bank to Mrs. Jordan, May 4, 1875; and condemned the bank and William T. Jordan, *in solido*, to pay rent at the rate of \$1500 per year from December 27, 1871, to May 4, 1875, and the Citizens' Bank and Mrs. Jordan to pay, *in solido*, rent at \$1500 a year from May 4, 1875, until delivered, being the one half of the rental value of the property.

From this judgment all the defendants appealed: and the plaintiff, in his answer, asks that the judgment be so amended as to decree the nullity of the mortgage of June 28, 1859, as a whole, and specially as to the one-third interest of Mrs. Gillaspie; and that the judgment of separation be decreed a nullity in so far as it affects the rights of the minors.

So far as the exception of want of tender is concerned, but little need be said. The case is not analogous to that in which a third person, a stranger, buys at a judicial sale, and pays the price, which is used in discharging liabilities for which the heirs were bound. The bank, the seizing creditor, was the adjudicatee; and the debt was not actually paid.

As to the same plea set up by Mrs. Jordan, her purchase from the bank was at private sale; and she can not invoke the rules applicable to judicial sales. Moreover, and this is true with respect to both these parties, these minor children can not recover and obtain possession of the property. The law makes them beneficiary heirs; and they can only receive their share of the residuum after the payment of the debts of the two successions.

The pleas of prescription need not now be noticed, nor the other exceptions specially. The beneficiary heirs, while they can not be allowed to recover and obtain possession until the debts are paid, may certainly maintain any action that may be necessary either to reduce the amount of the debts of the succession, or to bring into it property which belongs to it which may be in the possession of and claimed by others.

With respect to the rents of this property, as these heirs are beneficiary heirs the rents do not belong to them: they belong to the successions of their mother and grandfather: and will be assets for the payment of the debts, if such rents are due and recoverable.

As to the mortgage of June 28, 1859, we can not imagine what law is violated by it. The bank did not sell the stock to Dr. Jordan and his children. The owners of the stock sold it with the consent of the bank. So much of section four of the charter as declares that the mortgages given by the stockholders shall remain as a perpetual pledge to the holders of the bonds, etc., must be construed in connection with section 28, which specially authorizes the stockholders to sell and transfer their stock, provided the proposed transferee "shall furnish a mortgage to the satisfaction of a majority of the directors."

There is nothing in the law, nor is there any thing in the charter, which forbids women, married or single, to become stockholders, and to mortgage their property to the bank. Section 25 of the charter enables wives to bind themselves conjointly and *in solido* with their husbands; and to renounce, cede, mortgage, and hypothecate their rights, privileges, or property; as well dotal, as of any other nature or kind.

This section must be construed with reference to the general laws, which forbid the wife to bind herself or her property for the debts of the husband. The charter of the bank does not profess to repeal these general laws; and it simply enables the wife to mortgage her property and to bind herself conjointly and *in solido* with her husband when she exercises her lawful right and becomes a stockholder.

The power of renunciation was necessary, or thought to be so, because, at the time this charter was adopted, April, 1833, the opinion prevailed to some extent that the wife was forbidden by article 2412 of the C. C. to renounce, in favor of the mortgagee or vendee of her husband, her matrimonial rights on his property. In *Gasquet vs. Dimitry*, 9 La. 585, decided in June, 1836, this court so decided, after able and exhaustive argument, Judge Mouton dissenting. The Legislature put the matter at rest by the act of 1835, p. 153, which is the existing law. What this section 25 of the charter means is that the wife may mortgage her property and bind herself with her husband when she owns the stock; and that she may renounce her matrimonial rights when her husband owns the stock and mortgages his property.

The last clause of section 24 of the charter has been evidently misinterpreted by the defendants. It declares that "all property mortgaged to said corporation, for any purpose, may be seized and sold at any time, *according to law*, in whatsoever hands or possession the same may be found, notwithstanding any alienation thereof, or change of possession by succession or descent to heirs or legatees by last will and testament, or otherwise, in the same manner as if the same was in the possession of the original mortgagor."

To understand the meaning of this clause in the charter we must recur to the jurisprudence then existing.

As late as 1843, in *Erwin vs. Lowery*, vi. Rob. 28, this court held that executory process could not issue where the mortgagor was dead : and in the case of *Lowery vs. Erwin*, vi. Rob. 192, the court decided that the order of seizure and sale can not issue against a succession in course of administration.

*Boguille vs. Faille*, 1 An. 205, decided in 1846, settled the law differently. The court said the mortgage creditor was entitled to go into the courts of ordinary jurisdiction and have the mortgaged property seized and sold ; and subsequent jurisprudence has confirmed this doctrine.

Section 24, therefore, means that the bank shall have the right, which without such special law it would not have been permitted by the courts at that time to exercise, to seize and sell the property mortgaged to it, although the mortgagor be dead, and his succession in process of administration. According to the present jurisprudence, the pact *de non alienando* secures to the mortgage creditor all that this clause in the charter secured to the bank ; but, as we have seen, for more than ten years after the granting of this charter the courts maintained that, in case of death the mortgage creditor was compelled to go into the probate court and there enforce his rights "*in concurso* according to his rank in relation to the other creditors, and in due course of administration." VI. Rob. p. 28.

It never was intended, by this section 25, to permit the bank to seize and sell the mortgaged property otherwise than "*according to law* ;" that is, in accordance with the laws governing this form of proceeding. The Code of Practice requires notice to the debtor, which is given by serving on him a copy of the order of seizure and sale. If he be absent and not represented, the court must appoint an attorney to represent him, to whom notice must be given, and contradictorily with whom the seizure and sale shall be prosecuted. Articles 735, 736, 737. If the debtor be dead, notice must be given to his legal representative, executor, administrator, tutor of the heirs, whoever actually administers the succession, or to the heirs, where they are of age, have accepted, and are in possession. *Dupuy vs. Berniss*, 2 An. 509 ; *Nicholls vs. Grice*, 6 An. 446 ; *McCalop vs. Fluker*, 12 An. 551.

No law authorizes service of notice on the "actual possessor" of the property. The notice is in lieu of the citation which would be required in an ordinary action ; and it must be served on a person on whom citation might have been served in an action against the mortgagor *in personam*.

The plaintiff and his wards have no interest to demand the nullity of the judgment of separation between Mrs. Jordan and her husband ; and they have no right to demand and recover either the shares of the property inherited by them, or any aliquot part of the rents which may

be chargeable against those who have occupied the land. It is indispensable that there should be an administration of the successions of Mrs. Fannie Virginia Gillaspie and of her father; that the claims of the creditors of both be adjusted; and that the demands of the one of these successions against the other, and of these successions against others, be settled in due course of administration.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be amended so as to read thus: "That the sale by the sheriff to the Citizens' Bank on the third day of February, 1872, in the suit by executory process, No. 193 of the docket of the district court in and for the parish of Richland, entitled the Citizens' Bank of Louisiana vs. H. Jordan, Wm. T. Jordan, and Mrs. F. V. Gillaspie and Husband, and the sheriff's deed to the bank of date February 7, 1872, in confirmation of the said sale, be and the same are hereby declared to be null, void, and of no effect; that the sale and conveyance made by the Citizens' Bank of Louisiana to Mrs. Elizabeth F. Harrison, wife of William T. Jordan, passed before Felix Grima, notary public, of the city of New Orleans, on the fourth day of May, in the year 1875, be and the same is hereby declared to be null, void, and of no effect; that the property in the said sheriff's deed and in the said conveyance of May 4, 1875, mentioned and described be and the same is hereby declared to be the property of William T. Jordan, to the extent of one undivided third; of the succession of Mrs. Fannie V. Gillaspie, to the extent of one undivided third; and to the succession of Harrison Jordan to the extent of one undivided third; that the mortgage of date June 28, 1859, granted by Harrison Jordan, Wm. T. Jordan, and Mrs. Fannie V. Gillaspie, then wife of William M. Gillaspie, to the Citizens' Bank of Louisiana, by act passed before Adolphe Boudousquie, notary, of the city of New Orleans, be re-instated, and declared to have all the force and effect which it had at the date of the filing of the petition of the Citizens' Bank in the suit No. 193 of the docket of the district court in and for the parish of Richland, that is, on the 20th day of December, 1871; that the rights of the succession of Mrs. Fannie V. Gillaspie and of the succession of Harrison Jordan to sue for and to recover the rents and revenues of the Trio plantation of and from the Citizens' Bank and William T. Jordan and Mrs. Elizabeth F. Harrison, wife of William T. Jordan, for and during the time that they, or any of them, have claimed to own or have used and occupied the same, be and the same are hereby reserved; that as thus amended the said judgment be affirmed; that the said judgment appealed from be and the same is hereby in all other respects annulled, avoided, and reversed; and that plaintiff, appellee, pay the costs of this appeal, and that defendants, appellants, pay the costs in the district court.

No. 826.

## THE STATE VS. JAMES SWAYZE.

When, on the application of the counsel of an accused on trial for murder, the judge promises to put his charge to the jury in writing, and up to the close of the trial has failed to do so, the mere fact that the counsel for the accused renounced his right to a written charge, for fear that the additional delay necessary to enable the judge to write out his charge might prejudice the jury against the accused, will not impair the right of the accused to a new trial on the ground that the judge failed to give the written charge.

This court will grant new trials in criminal cases, but only on pure questions of law.

The charge of the judge in a criminal case that "where the killing is proved, malice is presumed by the law from the fact of killing," is erroneous. It is from the surrounding circumstances, and not from the act of killing that malice is to be inferred, and to be inferred by the jury, and not, as an implication of law, to be applied by the court.

The State has no right, on cross-examination of the defendant's witness, to question the latter as to any fact not connected with the matters stated by him in his direct examination.

The judge presiding at a criminal trial has no authority to state in the hearing of the jury, that a certain explanation given by a witness for the State "was a most important and material explanation."

**A** PPEAL from the Twelfth Judicial District Court, parish of Catahoula.  
*Smith, J.*

*W. N. Potts*, District Attorney, for the State.

*Chas. J. Boatner* for defendant.

The opinion of the court was delivered by

DEBLANC, J. The verdict against defendant is "guilty of murder, without capital punishment." In accordance with that verdict, he was sentenced to imprisonment in the Penitentiary for the term of his natural life, and has appealed to this court.

To obtain the reversal of the judgment pronounced against him, he relies on four grounds:

1. That his motion for a new trial was improperly denied.
- 2 and 3. That the judge erred in admitting against him evidence which he considers as illegal, in refusing to charge—as he was requested to do—matters of law, and in charging as law applicable to this case an erroneous construction of the law itself.
4. That he improperly interfered in the trial, by expressing his opinion of the value and weight of the testimony of a witness, while it was being delivered to the jury.

## I.

Before the trial and out of court, the prisoner's counsel informed the judge that he desired him to deliver in writing his charge to the jury. Do you in fact, asked the judge? I do, answered the counsel. The reply was, either I will prepare it or prepare myself to make it. When the argument was closed, the counsel inquired of the judge

30	1323
44	1181
30	1323
45	12
45	1307
30	1323
46	1405
30	1323
48	438
30	1323
50	599
30	1323
112	334

whether he had prepared the charge, as he had been invited to do. He stated that he had not, but that if the counsel insisted, he would adjourn court and do so. The jury had then been confined for two days and two nights. Apprehending—as he swore he did—that, by requiring them to be confined another night and perhaps another day, he would incense them against his client, the counsel did not insist on the desired and promised charge.

The counsel testified that the reason why he was particularly anxious for a written charge was that—on a previous occasion—the judge had expressed an opinion highly unfavorable to the accused. What it was, we are not informed. The trial of this case seems to have been strictly, but fairly conducted: the record does not contain the least trace of any prejudice against the prisoner.

The important question here presented is: under the circumstances which we have related, ought the judge to have given a written charge, without requiring the counsel to insist upon it? It is true that the request so to charge had been irregularly made, but—howsoever irregular it was—that request had been acceded to, and the judge had promised to deliver the charge in the desired form, and—we believe—should not, at a critical moment, have thrown, on the prisoner's counsel, the responsibility of incurring the jury's displeasure.

There is an unimportant difference between the statements on which the application for a new trial is based, and those certified to in the bill of exception: but, whether taken separately or collectively, they impress upon the mind the conviction that the counsel relied on the judge's promise, that he expected a written charge, and that—by the judge's unintentional failure to prepare it in advance—he was placed under a moral and difficult restraint, which is more easily understood than described, and from the fetters of which he could extricate himself but by renouncing an indisputable privilege, the exercise of which he considered of vital importance to his client. It does not appear that his renunciation was a free and untrammelled one; at least, there is a serious, a reasonable doubt that it was, and the benefit of that doubt should not have been refused to one whose life was at stake, and whose entire liberty has been declared forfeited by the verdict rendered against him.

We admit—as contended by the district attorney—that, when the motion for a new trial is based on exclusively the appreciation of facts, the discretion of the district judge is unlimited, absolute, and his decision thereon final and irrevocable—but when, in an application for a new trial or otherwise, and from established facts, there flows a question of law, our jurisdiction extends to that question, and we have—then—the constitutional power to review the decision of the lower court. 11 A.



478. In this instance, though he was not peremptorily denied, the prisoner was inadvertently deprived of a legal right.

## II.

The judge charged the jury "that, where the killing is proved, malice is presumed by the law from the fact of killing, and that it was incumbent on the accused to prove any matter of excuse or extenuation," etc. This unqualified charge was too broad: the law throws around the prisoner, as a protective mantle, a presumption of innocence, whatever may be the crime for which he stands indicted. That rule has been adopted by, and—now—is in force in nearly every civilized State of the world. What would be its value and what would become of it, if the naked proof that the prisoner has killed, were to import—as a legal inference, that he has killed with malice and premeditation and that he is guilty of murder. Those adverse presumptions cannot co-exist: homicide is not always criminal: it may be justifiable and excusable: one may, without being guilty of any offence, kill in self-defence, to protect his property, to prevent a felony, in case of shipwreck and accidents, or in the lawful execution of the lawful mandate of a competent court. Were the criminality of the act attached and linked to the unqualified proof of the act itself, the killing once established, though it may be either justifiable or excusable, the State would be dispensed from proving the guilt of the accused, and he—under that perverted doctrine—would have to prove his innocence.

Before delivering this part of his charge, the judge had distinctly instructed the jury that "it was incumbent on the prosecution to prove, beyond a reasonable doubt, the commission of the alleged crime, etc." Considered separately from the other, this instruction was unobjectionable, but—coupled with the other—the jury could well draw, from both, the erroneous conclusion that, as soon as the killing had been established, the prosecution had proven, beyond a reasonable doubt, that it was done with malice and that defendant was guilty of murder.

The killing of itself may, but does not invariably constitute a crime. The circumstances which surround the act either attest or negative a criminal intent: if none exist, the court—as said by Mr. Greenleaf—is justified in charging that, from the act of killing, *unaccompanied by circumstances of extenuation*, malice is presumed, (he should have said "*may be inferred*") and that the burden of disproving it is then thrown upon the accused. This rule is as correct as rational and its application would prevent an otherwise unavoidable conflict between the presumptions established by law in favor of the State, and of the prisoner. The intention *may be inferred* from the act; but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court. Greenleaf.

In a note appended to the report of the case of *Stokes vs. the People*, Horrigan and Thompson remark that "it is evident that the profession are becoming more and more dissatisfied with the doctrine that malice is to be presumed from the proof of killing, without more, and also with the doctrine that, the fact of killing being established, the burden shifts on the defendant, of showing circumstances of excuse or justification. In addition to *Stokes' case* in New York, and *Tweedy's* in Iowa, we may note that the doctrine seems to be greatly shaken, if not overthrown, in Michigan, by the very able Supreme Court of that State, in *Maher vs. The People*, 10 Mich., 212.

See H. & T. cases on self-defence, p. 938, 939, and authorities therein cited.

In *Waterman's U. S. Criminal Digest*, we find that "it is erroneous to charge the jury, on a trial for murder, that the homicide being proved, the law implies that the killing was wilful, deliberate and pre-meditated." p. 276, No. 243.

In Iowa, "*it is error*" to charge the jury, on a trial for murder, that if they find that the defendant inflicted the blow upon the deceased that caused his death, the burden of proof is upon defendant to show that he did it in self-defence.

*Waterman U. S. Crim. Digest*, p. 301, No. 492.

In York's case, reported in 19 *Metcalf*, 93, discussing the rule which we have quoted from *Greenleaf*, Mr. Justice Wilde said: that it was founded in a state of society no longer existing; that it was inconsistent with settled principles of criminal law, and that it was not supported by the weight of authority. He was of opinion that the following conclusions were maintained in sound principles of law and manifest justice:

1. That, where the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or manslaughter, is to be decided upon the evidence and not upon any presumption from the facts of killing.

2. That, if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favor of the prisoner.

3. That the burden of proof in every criminal case is in the government to prove all the material allegations in the indictment, and if on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him. Note to sec. 84, 1st *Greenleaf*. This doctrine has been affirmed by Chief Justice Shaw of Massachusetts and by the Supreme Court of Vermont, and is undoubtedly sustained by the soundest principles of law and of common sense.

It is manifest that the too rigid rule invoked by the counsel representing the State, that mere proof of the killing imports the deliberate intent to commit murder, would completely overthrow that paramount of all presumptions in criminal prosecutions, which is that—until the contrary be proved, the prisoner is presumed to be innocent, and also the almost universal doctrine that “to authorize the jury to return a verdict of guilty in a case of murder, the circumstances must not only be consistent with his guilt, but must exclude every other reasonable hypothesis.”

### III.

On the trial, the district attorney asked a witness sworn for the defence, the particulars of an alleged difficulty between him and the deceased. To the question propounded to that witness, defendant's counsel objected on the ground that no answer elicited by that question could possibly be considered as in rebuttal of any evidence offered by the defence. The court overruled the objection, on the ground that the answer might prove the motive of defendant's act and whether he was actuated by malice. The court erred: The fact of the difficulty referred to was proven by the State; none of its particulars had been recited by any of defendant's witnesses, and the counsel's objection should have been sustained: “the rule, says Greenleaf, is now considered by the Supreme Court of the United States, to be well established, that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination,” &c.

Greenleaf, vol. 1. p. 521 and 522, No. 445.

This rule applies to only the State, and as regards the cross-examination, by the State attorney, of defendant's witnesses, and does not apply to the prisoner and as regards his examination of the witnesses sworn for the State. The reason of the rule is that, in its direct examination of its witnesses, the State must prove every fact on which it relies to ask and obtain a conviction, and that, as the prisoner's right to introduce evidence in support of his defence, commences but when the direct examination on the part of the State is closed, he must be allowed to cross-examine the witnesses of the State as to any fact tending to establish his defence, whether the fact be connected with or disconnected from those testified to in the examination-in-chief.

In “the Philadelphia R. R. Co. vs. Stempson, Judge Story referred to that rule as a settled and broad principle, sometimes lost sight of, under loose practice at trials;” and, in *State vs. Dennis*, Mr. Justice Hsley, commenting on two adverse decisions of this court, said: “The discretion, which in the cases referred to, is claimed for courts, to relax, to change or to utterly disregard rules of criminal evidence which the

legislature has decreed it obligatory on them to observe, would be effectually to make the law a dead letter. Cases might certainly occur wherein a relaxation of the rule might serve to advance the course of justice; but, this is no reason why the general rules of evidence should not be observed, and until the law of evidence in criminal proceedings, now extant, is partially or wholly changed, our courts are not justified in exercising their discretion in regarding or disregarding rules of evidence, which our Legislature has adopted as a system. It was well said by Lord Kenyon that "rules of evidence are of vast importance to all orders and degrees of man, and that our lives, our liberty and our property are concerned in support of them."

In that case, the court held and we hold that, in a criminal prosecution, a witness—after his cross-examination, can be re-examined only in rebuttal or on matters elicited by his cross-examination. 19 A. 119.

#### IV.

The counsel for the prisoner complains that, in the presence and hearing of the jury, the judge remarked, referring to an explanation given by a witness for the State, "that it was a most important and material explanation." Though the judge did not state why, in whose favor or against whom it was important or material, the remark was unauthorized. In any case, and more particularly in a prosecution, the jurors justly look to the judge as their guide, and the expression of his opinion—as to the legal value of a fact testified to—might lead them to consider as useless a discussion of the fact thus declared important and material, and induce them to accept and adopt—as a finality—the judge's opinion as to its value.

#### V.

On application of the district attorney, an entry made on the minutes of the court on the 13th of May was corrected on the 22d, for the purpose of showing that the accused was present when he was arraigned and when the jury rendered their verdict. In this, there was neither impropriety nor error. The correction was extended to show facts which did not appear in the entry, though they really happened as rected in the allowed amendment.

It is due to the judge of the lower court to state that his rulings are not entirely without support, but they are in conflict with the weight of actual authority.

It is, therefore, ordered, adjudged and decreed that the judgment and sentence appealed from are avoided and reversed, the verdict of the jury annulled and set aside, and this case remanded to the lower court to be proceeded with according to the views herein expressed and according to law.

No. 738.

## \* THE STATE VS. MOSES HARRISON.

In order to convict a person, indicted under section 795 of the Revised Statutes of 1870, for biting off an ear, it must be shown that a sufficient portion of the ear was maliciously severed from the body of the injured person by the accused, to attract observation, and impair comeliness.

**A** PPEAL from the Fourth Judicial District Court, parish of Ascension.  
Marks, J.

*T. B. Earhart*, District Attorney, for the State.

*Pugh & Powell* for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant is indicted for a violation of the statute which reads—"if any person with malice aforethought, shall cut or bite off an ear \* \* \* of any person with intention in so doing to maim, disable, or disfigure him, he shall on conviction," etc. Revised Stats, 1870, sec. 795.

No portion of the ear was severed from the head of the person assaulted. The lobe was split by the bite, and the split was sewed up by a surgeon. McGowan, the person injured, neglected his wound, and inflammation and ulceration ensued, whereby there was a loss of the tissue of the ear.

The defendant's counsel asked the court to charge the jury,

1. That to constitute the crime charged, it is essential that the ear, or some portion thereof, should be actually severed from the head,

2. That to constitute a disfiguring under the statute, it is necessary that the nature of the wound be such as to attract observation and to render the person less comely.

The court refused to charge as requested, but instructed the jury as follows:

1. That the essence of the crime was malice, and the intent to maim, disable, or disfigure.

2. That if the jury believe there was not an actual severance of any portion of the ear from the head, but that the biting was such as to inflict a wound, the nature of and effect of which was to disfigure, or attract observation, and to render the person less comely, then under the statute the offence was complete.

The first part of the charge was correct, the second was error. The offence charged is the cutting or biting *off* an ear with intent to maim, disfigure, or disable, and not the infliction *upon* the ear of a wound, the nature or effect of which was to disfigure. It is not a sound construction to say, that it was only necessary there should have been

\* The opinion in this, and in the following case were delivered at the Monroe term of 1877.

a biting with intent to disfigure, since the statute requires a biting off, which must be of the whole or a part of the ear. The offence as defined by the statute, is not the disfiguring of any person by reason of biting his ear, but the biting off his ear with intent to disfigure.

The prisoner was entitled to the charge requested by his counsel. It has been held elsewhere under a similar statute that it was not necessary that the whole of the ear should be taken off, it being sufficient if a part was severed, provided such part was not merely the outside skin, and was so large as to make it perceptible to any one that a part of the ear was gone. *State vs. Girkin*, 1 Ired 259.

Bishop says, to constitute a biting off the ear, the whole ear need not be taken away. If enough is removed to impair the personal appearance, and render the person less comely, no more is required, but there must be as much as this done. *Crim. Law* § 1007. Wharton is of same opinion. *Rec. Indict. and Pleas*, 1 vol. 196.

It is therefore ordered, and decreed that the verdict of the jury be set aside, and the judgment and sentence of the lower court be avoided and vacated, and the prisoner be discharged from custody under the information.

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No. 730.

WM. MARBURY ET AL. VS. JAS. F. PACE.

In a suit to revive a judgment the sole issues to be tried are whether it had ever been rendered, and whether it had become extinct.

Neither a suspensive nor devolutive appeal will prevent prescription from running against the judgment appealed from.

A suit to revive a judgment is properly brought in the name of the original plaintiffs, even though the judgment may have become the property of third persons.

**A**PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray*, J.

*R. W. & R. Richardson* for plaintiff and appellee.

*Garrett & Garrett* and *F. P. Stubbs* for defendant.

The opinion of the court was delivered by

MANNING, C. J. This is an action to revive a judgment.

Until the statute of 1853, judgments were imprescriptible. The special and sole object of that act was to subject them to that mode of extinction. Of course some mode had to be provided of avoiding that prescription then for the first time imposed. The mode was the issuance of a citation according to law to the defendant, or his representative. The issuance of a citation according to law means that it is based upon, or accompanied by a petition praying for a revival of the judgment.

The defendant is cited to shew cause why the judgment should not be revived, and therefore, he argues, he should be at liberty to shew

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Marbury vs. Pace.

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that it ought not to have been rendered, or to shew such defects in it as will annul it. The title of the act indicates its object. That object is to make judgments prescriptible, not to provide a new and additional mode of annulling them. The mode and causes of annulling them had been already provided. Code of Practice, articles 604 *et seq.*

Prior to 1853 there was no need to revive a judgment. It did not die of senility or inanition. The statute of that year fixed a limit to its life, and furnished the holder of it the means to prolong that life.

The sole issues therefore that can be tried in a suit to revive a judgment are whether it had ever been rendered, and whether it had become extinct. The proof of the former is a certified copy of the judgment itself, and of the latter an actual payment, or the payment which the law presumes to have been made from lapse of time, or some other mode of extinguishing it. This was held to be the proper construction of the law of 1853 in two cases last winter. *McStea vs. Rotchford*, *Brown & Co.; Burnside vs same*, not yet reported.

After judgment by default had been entered, the defendant moved to set it aside on the ground that he had taken an appeal from the original judgment, the revival of which is now sought. So far from the pendency of an appeal from the original judgment being a good reason why proceedings should not be taken to revive it, the want of such proceedings will enable the judgment debtor to plead its extinguishment by prescription, for it is now settled doctrine that whether the appeal from the original judgment be devolutive or suspensive, its pendency does not dispense the plaintiff who obtained it from instituting his action for its revival and citing the defendant to answer thereto. *Arronsmith vs. Durell*, 21 Annual 295; *Walker vs. Hays*, 26 Annual 176.

Objection is also made to the use of the names of the plaintiffs in the petition for revival, it being alleged by the defendant that one of them has no longer any interest in it. There is no exception or plea of misjoinder, and if there were, it would not be good.

The names of the original plaintiffs are properly used, and the revival enures to the benefit of the present holder.

The plaintiff is entitled to a judgment of revival. This judgment in no respect validates the original judgment, or corrects any defect in it, if such exists.

It does not impart to the original judgment any additional force or effect, but simply keeps it alive, preserves its validity, and prevents its extinction by the lapse of time.

The suit to revive is merely the mode provided to prevent the acquisition of prescription of a judgment, as the re-inscription of a mortgage is the mode provided to prevent its peremption.

It is therefore ordered, adjudged and decreed that the judgment of the lower court is affirmed with costs.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF LOUISIANA,**  
**AT**  
**NEW ORLEANS.**  


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**NOVEMBER, 1878.**

**JUDGES OF THE COURT:**

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR, HON. A. DEBLANC, *HON. W. B. EGAN, HON. W. B. SPENCER,	}	<i>Associate Justices.</i>
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No. 6920.

EDWARD J. GAY & CO. VS. FRANCIS W. PIKE.

Where two creditors holding the promissory notes of their debtor secured by one mortgage on the latter's plantation, sue on their notes and obtain personal judgments, and each seizes under *a. fi.* the crop grown on the plantation, and the proceeds of the crop are held (under an agreement between the seizing creditors which makes no mention of any privilege or pledge on the crop claimed by either creditor) to await the adjudication of their claims under their seizures, the creditor making the first seizure will acquire a preference.

Contracts made with factors to give them a privilege or pledge on crops, must stipulate the sum to be secured by such privilege or pledge, and no further sum than that thus stipulated and fixed can be covered by such contracts to the prejudice of other creditors.

**A** PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Beattie, J.*

*Robert M. Sims* for plaintiff and appellant.

*Laurence A. Suthon* for opponent and appellee.

The opinion of the court was delivered by

MARR, J. Mrs. M. M. Blanchard, wife of Lucius Suthon, sold half

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\*Justice Egan did not sit this term, and died November 28.

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Gay & Co. vs. Pike.

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of a plantation in Assumption parish to Francis W. Pike, and for the deferred payments he executed three promissory notes, each for \$3750, payable to her order, and secured by vendor's mortgage. She retained one of the notes, and indorsed two of them to Edward J. Gay & Co.

On the sixth of May, 1875, all these notes having matured, Mrs. Suthon brought suit on the one held by her; and, on the same day, on the answer and confession of Pike, judgment was rendered in her favor, with recognition of her mortgage rights; and on the twenty-seventh of May, Edward J. Gay & Co. brought suit on the two notes held by them, and on the same day they obtained judgment on the answer and confession of Pike, with recognition of their mortgage rights on the same property.

On the second of January, 1877, a writ of  *fieri facias*  issued on the judgment in favor of Mrs. Suthon, under which the sheriff seized, on the tenth of January, seventy-five hogsheads sugar, in the sugar-house of Pike; and on the twelfth of January, Edward J. Gay & Co. caused execution to issue on their judgment, under which the sheriff seized one hundred and one hogsheads sugar, including the seventy-five already seized under Mrs. Suthon's writ, and eighty-one barrels molasses, not seized under her writ.

By agreement of counsel representing both the seizing creditors, the seventy-five hogsheads seized by both were shipped by the sheriff to Edward J. Gay & Co., at New Orleans, "to be by them sold in the market, the proceeds of which shall be held by the said Gay & Co. to abide the decision of the court upon the claims of said Mrs. Suthon and said Gay & Co. for priority and preference to the said proceeds:" and on the twelfth March, the sheriff returned both writs, stating the seizure under each, the agreement, which he made part of his return, and that the proceeds of the seventy-five hogsheads, in the hands of Gay & Co., amounted to \$6615 35.

On the eleventh May Mrs. Suthon filed a third opposition in the suit of Gay & Co. vs. Pike, in which she gave the history of the seizures, and the agreement, and claimed to be paid the amount of her judgment, in full, out of the proceeds of the seventy-five hogsheads, as first seizing creditor. Gay & Co. and the sheriff, parties to this petition of third opposition, excepted that the sheriff was without interest, and had no funds subject to his control. Gay & Co. also plead that the sugar in question, with the consent of opponent, was released from seizure by the sheriff and shipped to them, and by them sold, and proceeds retained subject to their lien, privilege, right of pledge and pawn, to pay and re-imburse them for advances made to Pike, in 1876, for the cultivation of the plantation, and the making and saving of the crop, under their agreement with Pike, of fifth February, 1876, recorded on the

same day in the parish in which the plantation is situated, and that these advances amounted to \$12,744 70, on account of which Pike had paid them \$4828 58, leaving balance due them \$7916 12.

They also plead that the seizure by opponent, of the seventy-five hogsheads, was in violation of their rights, she well knowing that they had made all the advances to Pike, during the year 1876, to make and take off his crop, and that they were entitled to a privilege on the same to secure payment: and they prayed that the demand of opponent be dismissed, and that the superiority of their lien and privilege be recognized, and they be decreed entitled to retain the proceeds in their hands to pay and satisfy their claim.

It was admitted on the trial that the sheriff was without interest, and that the proceeds of the sugar had never been in his hands: and the suit was dismissed as to him. The district court maintained the opposition and claim of Mrs. Suthon, and decreed that her judgment be paid and satisfied out of the proceeds of the seventy-five hogsheads in the hands of Gay & Co.

There is no controversy about the account of Gay & Co., which is proven by several witnesses. The advances were made under a notarial contract, of date fifth February, 1876, by which Gay & Co. agreed to furnish Pike during the year supplies and money, not to exceed \$4200, exclusive of interest, commissions, charges, and expenses, and Pike granted them a lien, privilege, pledge and pawn, on the growing crop, and obligated himself to ship it to Gay & Co. for their security, as provided by the act of 1874, p. 114.

When the seizure was made by Mrs. Suthon, if Gay & Co. had any superior right or claim to the property, they should have asserted it, contradictorily with her, by third opposition. Instead of doing this, they seized under their judgment; and the sugar in controversy went into their possession only under the agreement, subject to the rights of the seizing creditors respectively.

The notes and mortgage on which the judgments in favor of Mrs. Suthon and Gay & Co. respectively were rendered gave them no right of preference or privilege on the gathered crop; but the personal judgment, in favor of each of them, entitled them to seize any property of their debtor subject to execution. As the seizure by Mrs. Suthon was first in date, it gave her a right of preference, unless some fact or circumstance gave Gay & Co. a superior right. The terms of the agreement would seem to limit the question of preference to the effect of the respective seizures.

If it be conceded that Gay & Co., notwithstanding the agreement under which they obtained possession of the sugar seized, would have had the right, in virtue of their contract, to apply the proceeds to the

## Gay &amp; Co. vs. Pike.

payment of their advances, the amount secured by the contract was expressly limited to \$4200, exclusive of commissions, interest, etc.; and up to the eighteenth of December, 1876, they had received and sold sugar and molasses, and carried the proceeds, amounting to \$4828 58, to the credit of Pike, as shown by their account current, made up to sixth March, 1877. In addition to this, they had the proceeds of the seventy-five hogsheads, \$6615 35, and of twenty-six hogsheads sugar and eighty-one barrels molasses not seized by Mrs. Suthon, but seized under their judgment, on the twelfth January, 1877, no part of which figures in that account. The counsel of Gay & Co. argue that they had a pledge and pawn of the entire crop; and were entitled to retain the entire proceeds on account of their entire debts. This might have been true if there had been no special contract fixing the amount to be advanced and secured by pledge of the crop; and if Pike, their debtor, had shipped the entire crop to them, and they had received the shipment, or bill of lading or letter of advice before any seizure was made. But Pike did not ship the seventy-five hogsheads to them, and he could not have done so, because the sheriff had seized and taken them out of his possession; and he no longer had the right or the power to ship or otherwise to control them. The sheriff shipped the sugar in question for a specific purpose; and it would not have been shipped to Gay & Co. except under the agreement, and for the purpose specified. Mrs. Suthon had seized it, and Gay & Co. had seized it; and it was shipped to Gay & Co. by the sheriff, because the parties seizing so agreed. The sugar did not go into the possession of Gay & Co. as consignees or agents of Pike, their debtor, but as consignees of the sheriff, who was not their debtor; and they received it impressed with whatever right Mrs. Suthon had acquired by the seizure under her judgment, on the tenth January, 1877.

If Gay & Co. could be heard, under their agreement with Mrs. Suthon, to assert any right to the sugar in question other than that growing out of their seizure, it is certainly not that of the consignee, for the reasons already stated, and for the additional reason that that privilege is expressly subordinated to that of a creditor resident of the State, acquired before the consignor has received the goods, or a bill of lading, or a letter of advice, or invoice showing that they have been dispatched to him. R. C. C. art. 3247. It is not the privilege established by article 3217, in favor of the creditor for necessary supplies, and for money used for the purchase of supplies and for the payment of necessary expenses for any farm or plantation, because the constitution, article 123, declares that no privilege shall affect third parties unless recorded in the parish where the property is situated: and it is not that which the contract of fifth February, 1876, was intended to

secure, because the amount secured by that contract was limited; and the proceeds of the crop received and sold up to the eighteenth December, 1876, nearly a month before Mrs. Suthon's seizure, carried to the credit of Pike's account, amounted to \$4828 58, or more than \$600 in excess of the limit, excluding interest, commissions, etc.

A factor agreeing with a planter for future advances, can not always know exactly what amount the planter will need. The law requires, whatever be the form of the contract, mortgage, or pledge, that it mention the amount of the debt to be secured, and that it be recorded in the manner provided by law. R. C. C. article 3158. Manifestly, the whole object of recording would be defeated if the act of mortgage or privilege were allowed to secure any amount not limited. Therefore, in such cases, it is usual to fix the limit of the advances, not to exceed a certain amount. Up to the amount thus fixed the security would be good, if valid in other respects; but it can not be extended so as to cover any sum whatever beyond the limit fixed in the contract.

Mortgages to secure future advances are usually so drawn as to cover any deficiency in the crop or goods with reference to which the advances are to be made. But a pledge, or lien, or privilege on the goods or crop is different. It is not intended to secure a balance: the object is to secure the sum advanced, to obtain possession of the goods or crop, and to apply the proceeds to the payment. If the proceeds do not suffice to pay the debt, of course they can not secure the balance; because the balance is what remains unpaid after the proceeds have been exhausted; and in no event can the pledge, or lien, or privilege be extended, to the prejudice of other creditors, beyond the amount stated in the contract.

If the rights of the parties are to be determined by the contract of fifth February, 1876, the debt secured by that contract had been paid and extinguished more than twenty days before the seizure by Mrs. Suthon. If they depend upon the seizures, Mrs. Suthon's was two days in advance of that of Gay & Co. In any aspect of the case, the right of Mrs. Suthon to be paid, by privilege and preference out of the proceeds of the seventy-five hogsheads sugar in the hands of Edward J. Gay & Co., the special consignees and depositaries, seems clear beyond doubt or question; and we find no error in the judgment of the district court so decreeing.

The judgment appealed from is therefore affirmed with costs.  
Rehearing refused.

No. 5869.

W. S. BENEDICT VS. J. A. FLORAT, TUTOR, ET AL.

The jurisdiction of the Second District Court for the parish of Orleans is exclusively probate, and it has no power to entertain a question of title to real estate claimed by majors alone.

A suit for the partition of property which belongs in part to minors, and in part to majors, does not fall within probate jurisdiction. It must be brought in a court of ordinary jurisdiction.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*Francis W. Baker* for plaintiff and appellant.

*Saml. P. Blanc* for Mrs. Fitzpatrick, appellee.

The opinion of the court was delivered by

MARR, J. Patrick McGuigin died in 1865, leaving a large estate, and seven children, minors, issue of his marriage with their deceased mother. The executors of his will liquidated the succession expeditiously, and in October, 1865, they filed their final account, and turned over a large amount in money and property to Jules A. Florat, the tutor of the minors.

Shortly after he took possession of the effects, as tutor, having a large sum in cash on hand, Florat obtained leave of court to invest it in real estate; and in December, 1865, he purchased, in the names of the minors, two lots of ground, with the buildings and improvements, on Tchoupitoulas, between Poydras and Natchez streets, for \$30,209.

One of the heirs, George McGuigin, attained his majority in 1871. In 1873 he gave his note to Mrs. Fitzpatrick for \$300, which he failed to pay at maturity. She obtained judgment against him, and, under execution the sheriff seized and sold his interest in the succession of his deceased father and mother, adjudicated to Mrs. Fitzpatrick, and by judgment of the Second District Court, in March, 1875, Mrs. Fitzpatrick was recognized as subrogee of George McGuigin, and put in possession as owner of his share in the succession.

In July, 1875, George McGuigin sold to W. S. Benedict his title and interest, one undivided seventh, in the property on Tchoupitoulas street, which he declared was not included in the sheriff's sale to Mrs. Fitzpatrick; and on the thirteenth November, 1875, Henry C. McGuigin, another of the heirs who attained his majority, sold to Benedict his interest, one undivided seventh, in the same property.

On the twenty-seventh November, 1875, Mrs. Fitzpatrick, claiming to be the owner of one seventh, the share of George McGuigin, in the succession, brought suit, in the Second District Court for a partition; and she made Henry C. McGuigin, and the minors McGuigin, represented by their tutor, parties.

On the same day Henry C. McGuigin brought suit, in the same court for a partition; and he made George McGuigin, the minors, and Mrs. Fitzpatrick and her husband parties.

On the third December, 1875, W. S. Benedict, claiming to be the owner of two-sevenths of the Tchoupitoulas-street property, brought suit in the same court for partition; and he made the minors and Mrs. Fitzpatrick and her husband parties.

On motion of Florat, tutor, these three suits were consolidated, and judgment was rendered recognizing the parties as joint owners of the property: decreeing a sale for partition; and "reserving the antagonistic rights of all parties to be discussed in the partition of the mass."

Benedict moved for a new trial, mainly on the ground that the court should have passed on the conflicting titles, and no valid sale could be made until they were passed upon. The court ordered a new trial in the suit of Benedict only, that is, with respect to the Tchoupitoulas-street property alone; and in the suit of Benedict a judgment was rendered on the new trial, decreeing that this property be sold; and that the proceeds be held subject to the further order of the court.

Finally, in the suit of Benedict, a judgment was rendered in favor of Mrs. Fitzpatrick, against W. S. Benedict, decreeing the purchase made by her at sheriff's sale in February, 1875, to have included all the right and interest of George McGuigin in and to the undivided seventh of the Tchoupitoulas-street property; that the subsequent sale made by George McGuigin to Benedict, on the twenty-fourth July, 1875, was null and void owing to the previous sale of the same thing by the sheriff to Mrs. Fitzpatrick; "and further decreeing Mrs. Fitzpatrick to be entitled to the proceeds of said share in the partition had herein."

Benedict appealed from this judgment; and no other part of the case or controversy is before us for review. When the new trial was granted, the case of Benedict, in the suit brought by him, was separated from the other suits; a new trial was granted in his suit alone; a separate decree for the sale of the property, in which alone he was interested, was made; and the judgment appealed from was rendered in that suit between him and Mrs. Fitzpatrick alone, and it finally passed upon their respective rights and claims in and to the proceeds of that property alone. Our decree must be equally limited.

When the executors filed their final account, and the tutor took possession for the minors, of the entire residuum of the property and effects of the succession, the minors became co-proprietors; and the succession of Patrick McGuigin was closed.

When Florat, the tutor of the minors, by authority of the probate court, on the advice of the family meeting, invested their money, not the money of the succession, in the Tchoupitoulas-street property, and

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Benedict vs. Florat.

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took the title in the names of the minors, not in the name of the succession, the minors became co-proprietors of that property, as they were co-proprietors of the money with which it was purchased and paid for.

Benedict demanded a partition of that property; he had no right or capacity to demand any thing more, since his claim was limited to two undivided sevenths of that property as the vendee of two of the co-proprietors who had attained their majority, and were *sui juris*. The rights of the minors to five undivided sevenths of that property were not questioned, nor in any way controverted; and the only controversy was on the conflicting claims of Benedict, plaintiff in that suit, and Mrs. Fitzpatrick, one of the defendants.

The jurisdiction of the Second District Court is exclusively probate. Constitution, article 83; and it has no power to entertain a question of title to real estate claimed by majors alone.

The property never belonged to the succession of Patrick McGuigin. It belonged to Paul Cook when Patrick McGuigin died; and it was purchased of Cook, in the names of the minors, who were his children and heirs, with money in the hands of their tutor, as an investment for them. Two of the children, who were minors at the time of the purchase, had attained their majority, and had disposed of their respective shares and interests in this property; so that it was no longer the property of minors alone; and it was not the partition of succession property, nor the partition of the property of minors alone, that Benedict demanded or had the right to demand.

The partition of property which belongs in part to minors and in part to majors does not fall within the probate jurisdiction. It is not a probate case; it is an ordinary civil suit, between the co-proprietors, the object of which is to allot to each one of them his share and portion; and it belongs to the ordinary civil jurisdiction of the district courts. See *Sevier vs. Gordon*, 29 An. 440; *Soye vs. Price*, 30 An. 93; *Woolfolk vs. Woolfolk*, 30 An. 140; *Boutté vs. Executors*, 30 An. 182; *Succession of Bayly*, 30 An. 1032.

Mrs. Fitzpatrick excepted to Benedict's petition, that she was in possession under her title; and that the validity of her title could not be inquired into otherwise than by a petitory action. This exception was overruled, "reserving to her the right to plead the same on the merits." A default was taken against her; and she answered, "reserving the benefits of her exception already filed, renewing the same for the purposes of this answer, to the petition of W. S. Benedict so far as it relates to George McGuigin, pleads the general issue."

This plea went to the jurisdiction of the court, *ratione materiæ*. The question involved was purely one of title between two majors,

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Benedict vs. Florat.

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claiming under one and the same major; and this question the Second District Court had no power or authority to entertain or pass upon. The court should have dismissed the suit on this exception; and when the case came up for final trial, the only issues were those made by the petition of Benedict, the exception renewed in the answer of Mrs. Fitzpatrick, and the general issue pleaded by her. Instead of determining the question of title between Benedict and Mrs. Fitzpatrick, her plea and exception should have been maintained, and the suit dismissed.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the suit of W. S. Benedict be dismissed for want of jurisdiction, and without prejudice to the right and title asserted by him, or to those set up and asserted by Mrs. Fitzpatrick, and that W. S. Benedict pay all the costs of this proceeding in this court and in the district court.

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No. 7151.

## THE STATE VS. WILLIAM HARRIS.

No appeal can be taken in a criminal case after the expiration of the term of court during which the sentence in the case was rendered.

**A** PPEAL from the Fourth Judicial District Court, parish of St. Charles.  
*Duffel, J.*

*F. B. Earhart*, District Attorney, for the State.

*James D. Augustin* for defendant.

## ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. The defendant was convicted of rape, without capital punishment, and sentenced to hard labor for life.

The trial, conviction, and sentence was had at the April term, 1878, of the district court for parish of St. Charles. We take judicial cognizance of the fact that by act No. 41 of 1878 the April term of that court could not have extended beyond the thirteenth of April. A certified extract from the minutes shows also that the court adjourned *sine die* April 12, 1878. The appeal was applied for on the twentieth of April, 1878, and granted by the parish judge, acting in absence of the district judge from the parish, on the same day.

The State moves to dismiss the appeal, on the ground that the law requires appeals in criminal cases to be taken "during the term at which the sentence shall have been rendered," and "that no appeal shall be granted in such cases after the time specified shall have elapsed."



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State vs. Harris.

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Act No. 30, approved February 19, 1878. The law is peremptory, and the appeal having been taken after the time prescribed by law must be dismissed. There is no force in the defendant's proposition that the word "term" means a time covering the aggregate sessions of the court in all the parishes of the district.

The motion to dismiss is sustained.

Rehearing refused.

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No. 7075.

JAMES BUCKLEY vs. WM. H. SEYMOUR.

A state of facts brought to the attention of the court which would justify and require a new trial after judgment will justify the re-opening and re-assignment of the case before judgment.

One who is publicly acting as the deputy of a notary, and whose oath of office has been administered by the notary himself, is qualified to make demand of payment and perform the other functions of a deputy notary.

Only legal interest will be allowed when a larger interest is not stipulated in writing.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Sam. P. Blanc* for plaintiff and appellee.

*A. J. Lewis* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. J. A. Gresham executed his note to plaintiff, with W. H. Seymour as indorser, for \$4125.

Plaintiff alleges that after various partial payments thereon by Gresham, there remained due thereon at its maturity \$1507 20, which not being paid on due demand, said note was protested, and the indorser duly notified. He therefore brings this suit against the indorser.

The defendant answered by a general denial, and the averment that Gresham had made payments to an amount which reduced the balance due to \$957 20; that there was never any legal demand of payment, protest, or notice of protest, of said note. By supplemental answer he alleged in general terms that Gresham had made other and further payments on said note, and that there was but little if any thing due thereon.

After considerable testimony had been taken on the subject of payments, the court on objection of plaintiff's counsel to proof by defendant of any other defense than that of payment, permitted and required defendant to elect between the plea of payment and that of want of demand, protest, and motion, on the ground that they were inconsistent. The defendant elected the latter plea. He complains of this ruling, but

reserved no bill of exceptions to this refusal of the judge to hear further evidence on the plea of payment. We need not therefore notice the matter further.

The note was protested on thirty-first July, 1876, and notice of protest served on the next day, first of August; but by clerical error the notary certifies that the notice was served on thirty-first August instead of first August. He and his deputy were called to explain, and did explain, this error. Defendant objected to the proof. It is unnecessary to pass upon the objection, since the whole theory of the defense proceeds upon the assumption that the notice was given or attempted to be given on first August. The theory, as we shall see hereafter, is that the notary on first August left the notice for Seymour in the wrong office, to wit, Shannon's, and that one Dunham, by mistake, inclosed it in his *letter of that date* to Shannon in New York.

After the case had been submitted to the court, but before any decision thereon, the plaintiff made application to have the case re-opened, and re-assigned for trial, on the ground that he had since the trial discovered new and important testimony, etc. This application was accompanied by the usual affidavits, of diligence, discovery, materiality, together with detail of facts expected to be proved, etc. The court granted the application, re-opened the case, and re-assigned it for trial on — day of —.

The judge states as reason, that the facts disclosed would have been good ground for new trial, and that therefore he re-opened and re-assigned the cause. We see no error in this. A state of facts which would justify and require a new trial after judgment certainly justifies the re-opening and re-assignment of the case before judgment. The law does not require courts to do vain things—to go on and render judgments which it is manifest they would immediately have to set aside.

The merits of this controversy are narrowed down to two questions—

First—As to the legality of the demand of payment, and therefore of the protest;

Second—As to whether there was in fact a good service of notice of protest on Seymour.

The first question grows entirely out of the fact that the deputy notary, Barry, who demanded payment of the note, was sworn as such by Cohn, the notary, and not by a judge or justice of the peace. It is further urged that Barry was appointed by Cohn as deputy, and by him sworn as such, on sixth January, 1868, and that the offices of both Cohn and Barry, *ex necessitate*, were vacated by the going into operation of the new constitution in April, 1868. Arts. 150, 153, and 158 of that constitution are cited as authority for this proposition. We do not

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Buckley vs. Seymour.

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think they support it. It is stated as a fact by defendant that Cohn was re-appointed and qualified anew as notary under the constitution of 1868, but that Barry did not. We think it matter of no moment whether he ought to have done so or not, or whether he did so or not. Notaries and their deputies are officers recognized by law. R. S. 2491 to 2527. Notaries were in 1868 authorized to administer oaths, "*quoad* the duties of their office," R. S. 2493, and to appoint deputies. R. S. 2527.

Whether the notary Cohn had authority to administer the oath to his deputy or not is unimportant so far as third persons and the public are concerned. Barry was in the actual and open exercise of the duties of the office of deputy notary, and the public is not to be expected or required to institute investigations into the regularity and legality of the mode of his qualification. Such a requirement would be absurd in the last degree. The same rule would require every person filing a suit in court to investigate the question as to whether the deputy clerk or deputy sheriff actually discharging duties as such was or was not duly sworn as such. In conclusion, it is enough to say that Barry was an acting deputy notary, under color of authority, and so far as third persons are concerned this suffices to legalize his acts. The demand of payment and protest were therefore legal.

The only remaining question is one of fact. Mr. Cohn, the notary, certifies that on (31st) first August, 1876, he gave notice of protest to Seymour, by leaving the same "on his desk in his office, he not being in." Cohn states as a witness "*positively*" that he served the notice as stated, "early in the morning of the first August." It is not denied that he is a correct and truthful man. But the defendant contends that by mistake Cohn left the notice on Shannon's desk in an adjoining office; that by mistake one Dunham put this notice into a letter by him written that day to Shannon in New York. The testimony of Dunham and Shannon was taken, and it may be said to establish the fact that Dunham did send the notice to Shannon, and that it did not return to New Orleans until seventeenth August. But we do not think this shows the statement of Cohn to be false. Both might be true; for after Cohn left it on Seymour's desk it might have been taken into Shannon's office by some other person.

Many witnesses were sworn with purpose of showing that Cohn did not come into Seymour's office on first August, 1876. This testimony was taken in May and June, 1877, and all the witnesses state that they had never been talked to on the subject. The witnesses who are emphatic and positive that Cohn did not come into Seymour's office that day are Seymour, the defendant, and Killaly, his copying-clerk. These witnesses both swear positively that they were in the office the whole time from 9 A. M. to 4 P. M. of that day, and that it

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Buckley vs. Seymour.

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was impossible that Cohn could have come in and they not have seen him. But when we come to compare the testimony of these witnesses they are utterly irreconcilable. As we have stated, Seymour states that he was in the office all day, passing acts and helping Killaly make up his indexes, etc.; that he knew he was there all day without going out, only by reference to the amount of work he did in the office that day; that is his means of knowing, etc. Now Killaly swore that he came to the office that morning at nine o'clock, and produces a memorandum to that effect; that he found the office door open, and presumes it was opened by the colored man who attended the office. He swears that defendant Seymour *was not in the office that day!* Now Seymour swears he was there all day, and helping Killaly. Being asked if any person or persons came in during the day, Killaly said plenty of them, but could not name a single man, but he could swear Cohn did not come. In some respects this witness's memory was remarkably minute—descending into minutes in point of time, and to trifles in other matters. The judge *a quo* heard all this testimony and he did not consider it as disproving the truth of Cohn's statement. Neither do we. Perhaps it was before 9 A. M. that Cohn left the notice, for he says it was early in the morning, and perhaps this accounts for the office being open when Killaly reached it. Mr. Cohn, who had officially and contemporaneously certified, swears positively to doing a certain thing on a certain day, more than a year before. Seymour and Killaly swear that they were in the office all day and did not see him do it. We have no great confidence in the accuracy of a man's statement who undertakes to swear where he was every minute of a certain day, a year ago, where it is not pretended he was engaged otherwise than in the ordinary routine of his daily business. It is manifest that Killaly's memory is very bad, indeed, for he swears that Seymour was absent from his office all day, whereas Seymour swears that he was in the office all day from nine to four o'clock, and produces notarial acts passed by him at his office on that day.

Cohn may have deposited the notice before Seymour or Killaly reached the office. He certified officially at the time that he had so deposited the notice and confirmed the truth of his certificate by his positive oath to same effect. Defendant has not disproved by satisfactory evidence the truth of Cohn's statement. We attach but little importance to Dunham having sent the notice on to New York by mistake, as he swears; and we may add that we give but little credit to his evidence. This record teems with facts and circumstances going to show that he was either a remarkably unfortunate man, or else a man who was not unfamiliar with "ways that are dark." It is unnecessary to detail these facts and circumstances; suffice it to say that, like the district judge, we prefer to believe Mr. Cohn.

We think, however, that the judgment is for too much by \$25, and improperly allows eight per cent interest. The note stipulating no interest, it only draws five per cent from maturity. Plaintiff himself states that he received \$2500 in money, and was to allow five per cent bonus thereon, making \$2625, and that subsequently he received \$17 80 more. This reduces the debt to \$1482 20, instead of \$1507 20, as allowed below.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount thereof from \$1507 20 to fourteen hundred and eighty-two 20-100 dollars, and by reducing the rate of interest thereon from eight to five per cent, and that as thus amended said judgment be affirmed at costs of defendant in the court below, and at plaintiff's costs in this court.

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No. 6791.

A. M. AGELASTO vs. W. R. MILLS. RIGHTOR ET AL., SURETIES.

Where an appellee, on the ground of the insolvency of the sureties on the appeal bond, has procured a judgment of the district court setting aside the appeal, (which has been filed in this court and not afterwards dismissed,) he can not subsequently pursue the sureties in virtue of a judgment rendered in the case by this court.

**A**PPEAL from the Sixth District Court, parish of Orleans. *Tissot, J.*, presiding in place of *Rightor, J.*, recused.

*Robert G. Dugué* for plaintiff and appellant.

*Lyman Harding* and *J. Livingston* for defendants and appellees.

The opinion of the court was delivered by

MARR, J. William R. Mills obtained an order for a suspensive appeal from an order of seizure and sale; and he gave the usual bond, in the sum of \$9000, with N. H. Rightor as surety for \$4000, and D. W. Eames and Joshua G. Baker as sureties, each for \$2500. Plaintiff moved to set aside the appeal, on the ground that the sureties were insufficient. Pending this motion, on the 4th May, 1874, the transcript was filed in this court, and on the 4th June the district court dismissed the appeal. Mills applied for a prohibition to prevent the execution of the writ of seizure and sale. The usual rule *nisi* was granted; but it seems not to have been passed upon. The appeal was heard and determined; and a final decree was rendered by this court on the 30th November, 1874, affirming the order of seizure and sale.

After the decree of affirmance was rendered the sheriff re-advertised the mortgaged property; and on the 6th of February, 1875, part of it, two lots and the buildings and improvements in the Sixth District, was sold for \$2000, cash, of which \$614 43 were applied to a prior mortgage,

\$479 78 to the costs, and \$895 55 to taxes due, aggregating the sum of \$1989 76, and leaving \$10 24 to be applied to the mortgage debt, which amounted, up to the day of sale, to \$6077 24. The other property mortgaged, a lot with buildings and improvements in the Second District, was not sold, for want of bidders. On the 27th February this property was offered on twelve-months credit, and was not sold, for want of bidders, on account of the prior mortgages exceeding its value; and the writ was returned by order of plaintiff's attorney on the 24th of August, 1876.

A rule was then taken on the sureties in the appeal bond, to make them liable for the balance of the mortgage debt, \$6067. The sureties answered that they were not liable, because the order granting the appeal had been rescinded, the bond avoided, and the sureties discharged; that the order of seizure and sale had been satisfied by the sale of the mortgaged property; and that there was no personal judgment against Mills.

The district court discharged the rule on the ground that where the appeal was set aside because of the insolvency of the sureties there was no longer an appeal bond, there were no sureties, there was no appeal; and that the judgment setting aside the appeal and releasing the sureties stands unreversed and is forever final.

If it had been properly brought to the notice of this court that the order of appeal had been set aside by the district court because of the insolvency of the sureties, no doubt the appeal would have been dismissed. If the appellee had directed the attention of the court to the fact that he was arrested by the application for a writ of prohibition in the exercise of his right to enforce the order of seizure and sale, after the order of appeal had been set aside, no doubt the court would have passed upon the application, and would have dismissed it, and refused to hear the appeal, if the district court correctly decided that the bond was insufficient.

We are not prepared to say that if the appellee fails to have the appeal dismissed in this court, after the order of appeal has been set aside in the district court, and permits the further action of the district court to be suspended by the application for a prohibition, the jurisdiction of this court would be divested, and that its final action and decree on the appeal would be a nullity. The appeal bond is for the benefit of the appellee; and if he fails to bring to the notice of the court the fact that he is not secured by such a bond as he has the right to require, it does not follow that the court may not validly pass upon the appeal on the merits.

But it is clear that if the appellee procure the judgment of the district court setting aside the appeal for want of a sufficient bond, he has

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Agelasto vs. Mills.

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no claim on the sureties, whom he has thus formally refused to accept. It is obvious that the right of the plaintiff to proceed, after the district court has set aside the order of appeal for insolvency of the sureties, is no longer suspended by the appeal; and if he is delayed until the final hearing of the appeal, it must be because of some other act on the part of the appellant, or some omission on the part of the appellee, for which the rejected and released sureties in the appeal bond are not answerable.

The judgment appealed from is, therefore, affirmed with costs.

Rehearing refused.

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No. 7125.

## LAFAYETTE FIRE INSURANCE COMPANY VS. H. E. REMMERS.

A bill of exceptions need not be taken to the rulings of the court in civil suits. It is only necessary to note the exceptions in the note of evidence.

A party objecting to evidence offered in the court below must see that the objections are stated in the note of evidence; otherwise this court will not consider them.

The surety on an appeal bond has the right to show in his defense that a legal sale of the principal's property would have satisfied the plaintiff's writ, or that the fraud of the plaintiff prevented its satisfaction.

Where in an application for a rehearing no time is asked in which to file a printed statement of the applicant's points and authorities, and none has been filed, the rehearing will be refused.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Hornor & Benedict* for plaintiff and appellee.

*Kramer & Dalton* for defendant and appellant.

The opinion of the court on the original hearing was delivered by SPENCER, J., and on the application for a rehearing by MANNING, C. J.

SPENCER, J. The plaintiff obtained final judgment in this court against Remmers on a mortgage note for \$2800, interest, costs, and attorneys' fees. See 29 An. Webert was surety on the appeal bond in that case.

Pending that suit, the defendant, Remmers, brought suit in the Fifth District Court of Orleans to recover of plaintiff \$3500, amount of a fire policy on property which had been burned, said suit being styled Remmers vs. Lafayette Fire Insurance Company.

Soon after obtaining its judgment against Remmers, the Insurance Company issued execution, seized the mortgaged property, and also the claim and suit of Remmers against itself, then pending as aforesaid. The real estate was bought in at first offering by the Company for \$1070, which, after deducting costs, taxes, fees, etc., left a net credit of \$378 43 on the suit. The claim and suit of Remmers vs. the Company failing to

bring two thirds its appraisement was re-advertised for sale at twelve months. The sheriff returns that at this second offering this claim and suit were adjudicated to W. S. Benedict for one Joseph Mathis for \$100, which sum less certain costs was also credited on the writ, which was thereupon returned unsatisfied. Thereupon the present rule was taken against Webert, the surety, to make him liable for the balance of the judgment against Remmers.

Webert answered the rule by alleging in substance that at said second sale said suit and claim were adjudicated to him (Webert) for \$3050, more than enough to satisfy the writ ; that by consent of the sheriff he stepped out of the auction-room for a few minutes to get the surety on the twelve-months bond, offering and tendering to the sheriff before leaving \$3050 in money as a guarantee for his return with his surety to sign the bond ; that the sheriff said he would wait his return, and had made no demand on him or tendered the bond for signature ; that on his return, in about ten minutes, to his amazement he was told that the property had been re-offered, and adjudicated to the agent of the Insurance Company for \$100, although said agent had just a few minutes before bid on it to the amount of \$3025. He alleges conspiracy between the sheriff and plaintiff, and avers "that by this fraud, perpetrated by plaintiffs on this appearer, through the instrumentality of the sheriff, this appearer has been defrauded out of property adjudicated to him, and of the value of \$3500, for which he was entitled to a credit of twelve months, and but for said fraud, combination, and conspiracy between the plaintiffs and the sheriff the defendant in execution would have been entitled to a credit of \$3050 on said judgment."

The rule came on for trial, and the following is the note of evidence :

"Plaintiff offers in evidence the judgment in this case, No. 7315, also the decree of the Supreme Court ordering the execution thereof.

"Also the motion of appeal and bond of appeal.

"Also the writ of *fi. fa.* and sheriff's return.

"Defendant offers the witness now on the stand to prove the allegations of his answers.

"Objected to by plaintiff.

"Objection sustained by the court.

"Exceptions reserved by defendant.

"Rule submitted."

There was judgment against the surety for the balance of the judgment, \$2697 67, with interest and costs.

The surety appeals, and claims that the court *a qua* improperly rejected evidence to sustain the allegations of his answer.

Plaintiff contends that as the defendant in rule took no "bill of exceptions," and that as the note of evidence does not set out the



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Lafayette Fire Insurance Company vs. Remmers.

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grounds of plaintiff's objections, and as there is no assignment of errors, this court can not consider or determine the question whether the evidence was properly or improperly rejected ; and finally that "it does not appear from this note of evidence, nor is it a fact, that there was any witness on the stand."

This last proposition is certainly advanced in the very teeth of the record, which declares that he "offers the witness *now* on the stand to prove," etc.

As to the bill of exceptions, the law (Act No. 102, 1877,) does not require one to be taken, but authorizes the exception to be stated in the note of evidence.

We think it was the duty of the plaintiff, making objections to defendant's evidence, to state them, and see that they were properly noted. He knew better than any one else what were his objections, and if he did not state them we can not presume what they were or supply them in a case where the record purports to contain a note of the evidence. Perhaps he assigned no grounds of objection, and if so neither the clerk nor defendant is responsible for the record not showing any. If what the defendant in the rule alleged and offered to prove be true, it is manifest that the sale of the property of Remmers realized more than enough to satisfy plaintiff's writ, and that this proceeding against the surety is wrongful and illegal. We are at a loss to conceive upon what grounds he was debarred from the right to prove the facts alleged. He certainly had the right to show either that plaintiff's writ was satisfied, or that a legal sale of the principal's property would have satisfied it, or that the fraud of the plaintiff prevented its satisfaction. Any one of these facts was good cause why judgment should not be rendered against him in this proceeding.

If what he charges be true, flagrant injustice has been done him and his principal, and we are not disposed, upon what is to say the most of it a doubtful technicality, to cut him off from relief.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this case be remanded to be proceeded with according to law, appellee paying costs of this appeal.

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ON APPLICATION FOR REHEARING.

MANNING, C. J. The application for a rehearing of this cause was filed in time, and with it a statement in manuscript of the reasons upon which the application is founded. No time was asked in which to file a printed statement of the points and authorities on which the applicant relies, and none has been filed. Rule IX makes this imperative: For want thereof,

The rehearing is refused.

## No. 7213.

## STATE EX REL. J. P. BECKER VS. JUDGE SIXTH DISTRICT COURT.

No district court of the parish of Orleans has authority to issue a writ of injunction to restrain the execution of a judgment rendered by any other district court of that parish. The court which renders the judgment can alone enjoin its execution.

**A**PPPLICATION for writs of mandamus and prohibition.

*W. E. Murphy* for relator.

*Simeon Belden* for respondent.

The opinion of the court was delivered by

SPENCER, J. Relator, Becker, having obtained judgment in the Third District Court of Orleans against William Winkleman, issued execution thereon.

Frederick H. Quick, alleging that Becker was about to cause the seizure of certain premises belonging to him, obtained in the Sixth District Court of Orleans an injunction restraining the execution of said writ. Relator asks that said court be prohibited from proceeding in said cause.

The only question necessary for us to decide is, whether the Sixth District Court had jurisdiction and authority to issue said injunction against the process of the Third District Court :

Act No. 86 of 1870 provides, section one—"That whenever a suit or judicial proceeding is instituted in any of the courts of the parish of Orleans where such court has jurisdiction, all parties to such suits shall be confined *exclusively* to such court for the trial of all issues or matters that may arise in the course of such litigation, or out of the judgment rendered in such litigation ; and no *other* judge shall have jurisdiction to grant orders of injunction, sequestration, or any other order by which the proceeding in such litigation or judgment rendered therein, or property in litigation shall be stayed or in any manner interfered with or interrupted ; nor shall any *other* judge grant any of the above orders *in favor of any party not a party to such litigation or judgment*, claiming to have an interest therein or to be affected thereby ; but all such orders shall be granted by the judge before whom the original suit or judicial proceedings were instituted."

The second section makes it the duty of the judge who may have granted such order, in contravention of this act, to immediately (on having the fact brought to his knowledge, *ex parte* or otherwise) revoke and rescind such orders, either in chambers or open court, and to cause the officer in charge of the execution of such writ to be notified of such revocation, and to return the same at once, etc. It denounces severe penalties for disregarding its provisions.

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State ex rel. Becker vs. Judge Sixth District Court.

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We see no reason to doubt that the proceedings in the Sixth District Court were taken in violation of this mandatory and punitive statute, and are illegal and void.

It is therefore ordered that the provisional writ of prohibition heretofore issued be made peremptory, and that defendants pay costs of this proceeding.

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No. 6863.

JAMES G. CLARK VS. THE BOARD OF HEALTH ET AL.

The act No. 37 of the extra session of the Legislature of 1877, regulating the sale of coal oil, petroleum, etc., prescribing penalties for the infraction of the act, and delegating to the Board of Health the authority to enforce the law, does not violate article 114 or article 118 of the constitution of the State; or that provision of the constitution of the United States giving to Congress the power to regulate commerce between the States; or that provision forbidding any State to lay any impost or export duty except what may be necessary to the execution of its inspection laws. Act No. 37 is an inspection law.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*McGloin & Nixon* for plaintiffs and appellants.

*Kennedy & Austin* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. Appellants, plaintiffs, dealers in coal oil, in the city of New Orleans, brought this suit to have declared unconstitutional and void an act of the Legislature, No. 37, of the extra session of 1877, p. 60, entitled "An act to provide for the gauging and inspecting coal oils, or fluids derived wholly or in part from coal or petroleum; to regulate the sale or disposition of the same; to prohibit, in certain cases, the sale or disposition of illuminating oils or fluids dangerous to life and property, and to prescribe penalties for violations of this act."

They also sought to obtain an injunction forbidding the Board of Health to collect fees, as provided for in the act, and to execute it otherwise, on the ground that its provisions are in conflict with both the Federal and State constitutions.

Appellees, defendants, excepted that the petition disclosed no cause of action; and they also answered by pleading the general issue. On rule *nisi*, the district court refused to grant the preliminary injunction; and, on trial on the merits, there was judgment in favor of defendants against plaintiffs, from which plaintiffs appealed.

There are no issues of fact involved. The plaintiffs object that the act in question violates articles 114 and 118 of the State constitution;

and article 1, section 8, clause 3, and section 10, clause 2, of the constitution of the United States. We shall consider these objections in their order.

First—Article 114 of the constitution of the State provides that “every law shall express its object or objects in the title.” The first and second sections of the act authorize the State Board of Health, in the parish of Orleans, and the mayors and councils of the towns and cities in other parishes, of not less than 2000 inhabitants, to appoint gaugers and inspectors of coal oils and all illuminating fluids or oils derived wholly or in part from coal or petroleum, and of all fluids commonly known in commerce as naphtha, deodorized naphtha, or gasoline, or benzine; the gaugers and inspectors to be sworn, and to give bond for the faithful performance of their duties; and to receive such salaries as may be fixed by the Board of Health, or the mayors and councils by which they are respectively appointed.

The third and fourth sections prescribe the duties of these gaugers and inspectors. The fourth section provides that they shall give proper certificates to those requiring such gauging and inspection, duplicates to be furnished to the Board of Health, and it authorizes the Board of Health in New Orleans to collect a fee of a quarter of a cent a gallon, for gauging and inspecting oils not in barrels, and twelve and a half cents per barrel, including the replacing of the bung.

The fifth section imposes a penalty for selling or exposing for sale coal oil or illuminating oil or fluid, as described in the first section, not gauged and inspected. The sixth section prescribes the penalty for selling or exposing for sale, or giving or delivering such coal oils or illuminating fluids the flashing point of which is less than 125 degrees of Fahrenheit, unless the package be stamped conspicuously, “explosive and dangerous:” and the seventh section prescribes the penalty for selling or giving or delivering any such illuminating oils or fluids which have not been inspected, gauged, and stamped.

The eighth section makes it the duty of the Board of Health in New Orleans, and of the district attorneys in the country parishes, to sue for the penalties incurred by violation of the act; and provides for the disposition to be made of the fines recovered, to be paid to the Board of Health in New Orleans, and to the Charity Hospitals at Shreveport and Baton Rouge.

The ninth section, the more effectually to carry out the provisions of the act, authorizes the district attorneys in the country parishes, and the Board of Health in New Orleans, at the time of bringing suit, or subsequently, without bond, to obtain a writ of injunction forbidding the defendant in such suit to do or suffer to be done any of the acts on account of which such suit was brought: and the tenth section fixes

the date at which the act shall take effect; and repeals all conflicting or inconsistent laws.

If there is any part of this act which is not strictly germane to and included in the objects expressed in the title, we confess our total inability to perceive it: nor can we discover in it any violation of act 114 of the constitution.

Second—Article 118 of the constitution provides that "taxation shall be equal and uniform throughout the State;" it also forbids specific taxation; and it requires that all property shall be taxed *ad valorem*.

There is nothing in this act that can be supposed to be in violation of this article of the constitution except the fee of a quarter of a cent per gallon, or twelve and a half cents per barrel, which section 4 authorizes the Board of Health in New Orleans to collect.

As early as 1805 an act of the Legislature was passed, regulating the inspection of flour, beef, and pork, fixing the weight of the barrel, the fees for inspection, and penalties for violation of the provisions of the act. In 1816, an act was passed regulating the inspection of tobacco in hogsheads and casks, fixing the fees for inspection, and prescribing penalties, etc. Hay also was made subject to inspection; and so were weights and measures. These laws have been revised, and re-enacted; and they are local regulations; they are now in force. Similar laws exist in all the States; and yet, it is a fundamental principle in all well-organized governments, that taxation must be uniform and equal; and this principle derives no additional force by the mere formulation of it in written constitutions.

Inspection laws are a necessity. They have for their object the protection of buyers and consumers against fraud in weights and measures; and of life and property against the risks of exposing for sale and selling, without proper notice and warning, dangerous commodities, and such articles of food as are unfit for use, or, from their condition, would be injurious to health.

It is admitted, indeed it can not be questioned, that as inspection laws are necessary, it is also necessary to compensate the persons charged with the important duties required of inspectors. The specific objections to the act in question are that the fees fixed by section 3 are applicable to dealers in New Orleans alone; and are, therefore, partial; and that they are not paid to the inspectors as compensation for their services, but to the Board of Health; and it is urged that this feature makes them a tax.

With respect to this first objection, it is a sufficient answer to say that inspection laws are local. They are specially required at the great marts; and in a crowded city like New Orleans, where immense quantities of the explosive and dangerous illuminating fluids specified in the

first section of the act are in the hands of the numerous dealers, and are used in so many houses, and by so many of the inhabitants; where liability to explosions is so greatly increased; and where the consequences would be so much more destructive of life and property than in a small village, or in a single isolated house, there is so much the greater necessity for careful inspection, and for putting conspicuously on the packages in which these fluids are contained marks indicating plainly to dealers and consumers the degree of caution which is necessary to be observed in handling and using them.

In the country parishes, the Legislature deemed it sufficient to authorize the mayors and councils to appoint and to fix the salaries of the gaugers and inspectors; but it also deemed it necessary, in the city of New Orleans, to intrust this entire business to the Board of Health, composed, in part, at least, of scientific men, capable of ascertaining the qualifications of the gaugers and inspectors appointed by them, and of seeing that the important duties required of these functionaries are faithfully performed. The Board of Health fixes and pays the salaries; and obtains the means to pay them by collecting the fees provided in the act.

All such legislation falls within the police power of the State; and the State has chosen, in view of the grave interests involved, to delegate to the Board of Health the authority and the duty to see that the law is enforced. There can be no reason why the State should not thus provide for the execution of this branch of the police power, as validly as it might have contented itself with providing for the appointment of the inspectors by the Governor, or otherwise, and have fixed their fees. It was not unwise to require the Board to take upon itself this inspection, and to make the inspectors dependent upon and responsible to the Board.

We do not perceive in what respect the public interest suffers any detriment by the special provisions applicable to the city of New Orleans alone; nor do we think that this feature in the act, or any other of its provisions, violates article 118 of the constitution.

Third—Clause 3, section 8, article 1, of the constitution of the United States declares that the Congress shall have power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” Under this clause foreign nations and the several States of the Union have the right to send to our market the products of the soil, and the results of their skill and labor, subject to such regulations and restrictions as the Congress may impose. The State can not interpose any obstacle to this traffic, commerce; but the State can protect the health, the lives, and the property of its inhabitants against false weights and false measures: against the improper exposure and sale of articles dangerous to life and to property, or injurious to

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Clark vs. the Board of Health et al.

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health by their unsound condition and unfitness for food for man or beast. Such regulations do not fall within the terms and meaning of this clause of the constitution; they belong, not to the Congress, but to the police power of the State; and the Congress can not interfere with the proper exercise of this power. The inhabitants of other States and foreign countries may send their hay, flour, beef, pork, tobacco, illuminating oils, to our market for sale, and no power in the State can prevent it; but the State can and it is bound to subject all such articles to such inspection as will protect buyers and consumers from fraud, health from injury, and life and property from destruction.

Fourth—Clause 2, section 10, article 1, declares that “no State shall without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws, \* \* \* and all such laws shall be subject to the revision and control of the Congress.”

It is clear that the act of 1877 is an inspection law. Not a dollar of the fees goes into the State treasury; and whether these fees are in excess of what would be absolutely necessary or not, they are not a tax. They are the means provided to be used and expended by the Board of Health in the execution of the law. It is not alleged, nor is it proven, that the fees allowed are not absolutely necessary for executing the law; and the presumption is that, having the power to the extent of the necessity, the Legislature has not exceeded that power. But if this allegation were made, the serious question would arise whether it would be cognizable in a judicial tribunal.

Unquestionably, there are some of the prohibitions in restriction of State power in section 10 of article 1 of the constitution which must be enforced by the judicial power; perhaps all those contained in the first clause of this section; but with respect to the State laws which clause 2 recognizes and does not prohibit, within certain limitations they seem to be subjected to one tribunal only—“to the revision and control of the Congress.”

It is not necessary, however, to pass upon this question. It suffices to say that in this case there is no allegation, there is no proof, authorizing any inquiry as to the necessity of the amount fixed by the statute for the execution of the law; nor is there in the act itself any apparent violation of the constitution of the United States.

The act is wise and wholesome; and its rigid enforcement may prevent or diminish the number of the shocking accidents from the incautious use of illuminating oils and fluids with which the columns of the daily press teem.

The judgment appealed from is affirmed with costs.

Rehearing refused.

No. 7149.

## THE LOUISIANA NATIONAL BANK VS. THE BOARD OF LIQUIDATION.

The mere fact that certain valid State warrants paid to the State as the purchase price of State bonds that had been issued to the free-school fund, (and which the State had no power to sell,) are in the treasury of the State, and not in the hands of their owner, is not a ground for a refusal by the Board of Liquidation to fund them.

**A** PPEAL from the Third District Court, parish of Orleans. *Monroe, J.*

*H. C. Miller* for plaintiff and appellee.

*H. N. Ogden*, Attorney General, for defendant and appellant.

The opinion of the court was delivered by

DEBLANC, J. On the 5th of May, 1871, the Louisiana National Bank loaned the State—to assist it in stopping *crevasses*, the sum of \$20,000, and—to pay that sum—an appropriation was made by the Legislature on the 5th of March 1872. Under that appropriation, and in settlement of said loan and the interest which had accrued on it, the Auditor gave to the bank his warrant for \$21,751.10c. With that warrant and a small amount in cash, plaintiff liquidated the price of twenty nine bonds sold to it under act No. 81 of 1872, and which had been issued by the State, on the 1st of July 1857, to the free-school fund. These facts are tacitly admitted by defendant, and fully established by the evidence.

The Bank applied to the Board of liquidation to do one of two things—to either fund the twenty-nine bonds purchased by it, or to issue consols for the amount of the warrant representing the loan made to the State in 1871, and which was surrendered in part settlement of the price of said bonds.

This court having held that the sale of the school bonds is an absolute nullity—29 A. 77—the Board properly refused to accede to the first of the Bank's demands, but it should have granted the other. The loan was made to protect the State against the impending disasters of an overflow, and is—of this there can be no reasonable doubt—a valid and outstanding claim against it.

The only defence opposed to the alternative application of the Bank is that the Auditor's warrant surrendered as the price of the school bonds is in the public treasury, and can be taken therefrom but by direction of the Legislature. That defence is not tenable: the fact that the State is in possession of the evidence of one of its indisputable liabilities, is an additional reason why the as yet unsatisfied and already surrendered warrant should be funded. The State is justly entitled to the possession of the school bonds, but it could not justly keep the money loaned, the warrant delivered for that loan, the cake and the picayune.



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Louisiana National Bank vs. Board of Liquidation.

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In substance, the decree of the lower court is strictly correct: in form, it is not as complete as it should have been.

It is therefore ordered, adjudged and decreed that the judgment appealed from is amended, and the Board of liquidation ordered to fund the claim evidenced by warrant No. 2222, now deposited in the State Treasury, and drawn by the Auditor to the order of the Louisiana National Bank, on the 31st of May 1872.

It is further ordered, adjudged and decreed that, as amended, the judgment appealed from is affirmed with costs.

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No. 7118.

## JOHN MAGNER VS. THE HIBERNIA INSURANCE COMPANY.

A debtor whose property has been seized, sold and bought in by his mortgage creditor, can not subsequently acquire a tax title to the property, to the prejudice of the creditor, in virtue of a sale made by the tax collector, for taxes assessed in his name, and which had accrued on the property while he was the owner.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*John S. Tully* for plaintiff and appellant.

*Thos. Gilmore & Sons* for defendant and appellee.

The opinion of the court was delivered by

DEBLANC, J. On the 12th of October 1874, defendant, then a mortgage creditor of plaintiff, purchased—at a sale made by the sheriff to satisfy its claim, the property described in that officer's deed, and—by said sale and purchase—defendant's claim was but partly extinguished.

On the 15th of March 1875, the Insurance Company took a rule on the sheriff to be placed in possession of the property purchased by it in October 1874. The rule was made absolute, and—long after—on the 16th of November 1877, a writ of possession issued from the decree rendered in the rule. On the 26th of that month, the execution of that writ was enjoined by John Magner, on the ground that—on the 1st of June 1876—he had acquired his creditor's property at a tax sale.

That property was seized and sold by the State Collector for the taxes thereon levied and due in 1874, before the company had bought it at the sheriff's sale. In the act which evidences the last-mentioned sale, there is a declaration that the adjudicatee has retained—to be applied to the payment of those very taxes—the sum of \$139.55c.

How and from whom did the Tax-Collector seize the property? Was it from John Magner, who—though he continued in possession of the same—had then no title to it? Was it from the company, after the

formalities prescribed by law? On whom were the demands made, the notices served? We have found no evidence in the record relating to these facts, and two titles are before us: by both, it is the interest of John Magner which is transferred—: in 1874, to the Insurance Company—in 1876, to John Magner himself.

When, at that date—he purchased and took title to that property, he knew that it had—nearly twenty months before—been acquired by the Insurance Company, which then was and is now its creditor, and he—most probably—knew that—in April 1875, a rule to place said purchaser in possession had been made absolute.

It is true that—out of the price of adjudication of the 12th of October 1874, the Insurance Company had retained an amount corresponding to that of the State taxes of that year, and which outranked its mortgage; but it is also true that Magner was primarily liable for those taxes, and he could not—by the payment of his own, his acknowledged debt—evict his creditor and divest his title; nor can he successfully urge that—howsoever and under whatever circumstances it may have been made—the payment of such a claim by him, the debtor thereof, and of not a cent more than that claim, against the enforcement of which he was morally and legally bound to protect his creditor and his creditor's property, could, can or did—as between them, constitute—in fact or in law—the payment of a price and the consideration of a forced sale of his creditor's property, made for no other purpose than to satisfy a prior legal claim due to the State by the purchaser at that sale. He had the money to pay the taxes: he could have paid them before, as he did immediately after the sale: but he could certainly not—taking advantage of his own wrong, his own fault—acquire his creditor's property, seized and sold for his own debt, and do this without paying a single dollar over and above the amount for which he—the debtor—was liable before the adjudication from the Collector to him, before a sale which he had the means, and which it was his duty and obligation to prevent.

The deed from the Collector to Magner recites “that after having complied with all the legal requisites, the Collector seized and sold the property at public auction, and that John Magner being the last and highest bidder, it was adjudicated to him for the price of sixty-two dollars and forty-three cents.” What, according to the terms of the deed, was thus adjudicated? The right, title, and interest of John Magner in and to said property. At the date of that sale, and so far as disclosed by the record, he had no right, title or interest, in, on or to the same. He purchased, in 1876, what—to his knowledge—he had been divested of in 1874, by the foreclosure of a mortgage granted by himself, by the enforcement of his own obligation.

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Magner vs. Hibernia Insurance Company.

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The taxes for which the property was seized and sold by the Collector were due by John Magner before the sale from the sheriff to the Insurance Company, and at the date of the sale from the Collector to Magner. They were so due by him—if not to the State—to said company. As lately held by this court, the payment of the price of a sale made under such circumstances is but the payment of a claim for which the purchaser was liable before the sale; and he could not—by failure to comply with his obligation, by retaining the money with which he could have satisfied it—compel the enforcement of his own obligation, and derive, through that enforcement, by merely bidding and paying the amount of the tax due by him, a valid title to his creditor's property.

30 A. *ante*.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

Rehearing refused.

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No. 7005.

E. E. MAILHOT vs. ROBERT PUGH.

The owner of a plantation is not liable for damages to an adjoining plantation caused by works erected on his own plantation, in order to prevent its inundation by a destructive overflow of the Mississippi river; more especially when the owner of the adjoining place refused to co-operate in a common work for the protection of both places.

One can not claim indemnity for damages which he has contributed to bring about by his own negligence, or culpable indolence.

**A**PPEAL from the Fifteenth Judicial District Court, parish of Assumption. *Whittington*, judge *ad hoc*.

*Walter Guion* and *Wm. Reed Mills* for plaintiff and appellant.

*E. D. White* and *L. W. Folse* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The parties to this suit are owners of adjoining plantations on the right bank of Bayou Lafourche in the parish of Assumption. The plaintiff's demand is for eight thousand dollars as compensation for damages caused, as he alleges, by the acts of the defendant which occasioned the destruction of his crops in 1874.

The waters of the Mississippi river rose high in that year. There were several crevasses, and consequent inundations. These two plantations were endangered by the back water, which from the confirmation of that part of the country, was sure to flow in upon them from the rear, and this necessitated the construction of works for their protection.

The cause of action partly rests upon an alleged contract between the owners of the two plantations to keep up a common line of defence against back water, and upon the existence of a ditch, alleged to be common to both properties, through which some of the crevasse water passed, and in which was a temporary obstruction, placed there by defendant and by him subsequently removed.

Both of these failed to be substantiated on the trial. There was no proof of any contract between the present owners for a common system of defence, and none to establish a pre-existing contract which would amount to, or would entail, a servitude upon the lands. The ditch is there, but so far from being common, it is entirely on the defendant's land.

The action resolves itself into a claim for damages for loss occasioned by works erected by the defendant upon his own land to protect it from an alarming accession of water, and from what proved to be an extraordinary inundation. It is matter of public history that the overflow of 1874 carried ruin and devastation to an unusually extensive area of country, spreading especially over the alluvial basin between the Atchafalaya and Lafourche, and causing unprecedented destruction in the parish where the properties of these litigants are situated.

The pivotal inquiry then here is, is the defendant liable in damages for injury, caused by works erected on his own land to save it and the crops upon it from destruction, in an exceptional and pressing emergency.

The plan adopted by the defendant for the protection of his property, and the works erected in carrying it out, was intelligent and systematic. It was not hap-hazard. Nothing was done from mere transient impulse, or the suggestion of a moment, but the plan was conceived as a whole, and so perfected and executed. It also appears that defendant was both willing and anxious to have the co-operation of the plaintiff in maturing, adopting, and carrying out some system of defence, common to both, which each would assist in preparing, and which would equally protect both. Turjeon, the overseer at Mailhot's place, saw the necessity of a protecting levee being thrown up without delay, and the two proprietors had that matter under consideration. The judge who tried this case says in his written reasons for judgment;—"On the first of May three interviews between plaintiff and the defendant were had on the subject of building such protecting levee between their two places on the side of the canal towards Mailhot. Propositions between them were made at one time, an agreement accepted, then rejected, and eventually nothing was done towards building the projected levees.

"These several interviews, and the conversation which took place

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Mailhot vs. Pugh.

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thereat, and which is fully set forth by the testimony, will not lead me to believe other than that Mr. Mailhot was well aware of such a protecting levee as was spoken of and contemplated, being required as a means of defense to protect his plantation and cane from inundation by the crevasse water of the Mississippi, and to make it evident that Mr. Mailhot, at the time, could not have had any idea or belief that Mr. Pugh, by reason of his levee, dam or otherwise, intended to protect him, Mailhot, from inundation by crevasse water."

Further on, in relation to the same matter, the judge proceeds;—

"Plaintiff says it was impossible for him to put up a levee in time, because Pugh positively refused to enter into the agreement. From the testimony I do not understand that Mr. Pugh refused to enter into an agreement with Mailhot. On the contrary, defendant sought plaintiff, and expressed a desire to make an agreement with him for the erection of a proposed levee.

"Mr. Mailhot knew of the crevasses; knew that the water was coming; was aware that his levee was bad and weak, in fact in almost a worthless condition, and yet, after being advised by his overseer to build a stronger and more perfect levee on his side towards Pugh, to the building of which Pugh had consented and offered to assist him, he refused to do any thing; waits idly during the time. Turjeon says a levee sufficient to protect Mailhot could have been built, at a cost of about fifty dollars, and finally quietly subsides to the seepage and inundation, merely remarking to Mr. Pugh, "if I am inundated, I shall hold you responsible for what damage I may sustain."

The defendant, testifying, says his whole object was to protect a part of his crop from the imminent inundation, and that he was desirous of preventing any pretext for complaint, and therefore offered to assist the plaintiff in building a levee between certain designated points, provided a written agreement was made, exhibiting the stipulations and intentions of both parties, so as to prevent any misunderstanding, or pretense of legal obligation arising from effectuating those intentions. This was declined by plaintiff. Turjeon says that at one of the interviews between the plaintiff and the defendant, it was understood that the defendant was to work the pump, which working plaintiff alleges was one of the causes of his losses, and that the defendant also avowed his purpose to remove the dam, which subsequent removal was another cause of the inundation of plaintiff's land. This last statement was objected to, and a bill reserved to its rejection, which we think well taken, and not necessary to discuss.

An examination of the testimony satisfies us that the plaintiff had in his power his own protection, by a timely adhesion to the system of common defence promptly adopted by his more energetic neighbour,

which, if jointly executed with vigour, would have saved both from the devastating floods, which were sweeping on too fast to permit delay. The defendant, failing to obtain the co-operation of the plaintiff, proceeded to execute his own plan by the erection of levees upon his own property, and the construction of works thereon. These caused the damage to the plaintiff, as he alleges, and became the occasion of this suit.

It is disputed by the defendant that the works, erected by him, caused the damage. He charges that the seepage water was sufficient to have produced disaster to the plaintiff's crops, but it will be conclusive of the litigation, if we consider the matter in the light most favorable to the plaintiff, and as if the constructions of defendant had caused the damage.

The jurisconsults and tribunals of France have considered the questions presented in this case, not merely as abstract propositions, or naked principles, but in their practical application to actual events, and the consequences produced by them. France, like our State is traversed by rivers, whose banks are often unable to contain the swollen volume of water pent up between them, and give way under the pressure, or are submerged by the rising flood, until large tracts of country suffer from the inundation.

In Dalbon *contre* Graveson, it was held that—le propriétaire inférieur a le droit de construire des digues ou autres ouvrages pour se garantir de ces inondations, lors même qu'il aggraverait par là les dommages qu'elles peuvent causer aux propriétaires supérieurs. The Court delivering its reasons, or opinion, explain that the principles governing such cases are different from those regulating natural servitudes—que les ouvrages pour se garantir dans l'intérieur de sa propriété des débordements d'un fleuve ou d'un torrent sont régis par d'autres principes que ceux sur les servitudes naturelles—and proceed to declare, Que chacun peut se préserver dans sa propriété des débordements d'un fleuve lors même que les ouvrages faits pour s'en garantir porteraient préjudice au voisin. \* \* \* qu'en effet il en est du débordement des rivières comme des incursions de l'ennemi, dont chacun peut, par le droit naturel, songer à se garantir, sans s'occuper du sort de son voisin, qui n'aurait pas la même prévoyance. *Journal du Palais*, 1813, p. 384. And this was re-affirmed later. Duvernoy *contre* Sampso, *Idem*, 1861, p. 888.

The syllabus of these two cases is almost in the language of La-laure when treating of this subject: le propriétaire inférieur a le droit de construire des digues pour se préserver de l'inondation du torrent ou du fleuve qui borde son héritage encore ses digues fassent refluer les eaux d'une manière préjudiciable aux voisins. Edition 1827, p. 655.

Chardon, treating of the obligations of the proprietor, says ;—Tous

les ouvrages qu'ils jugent propos à garantir leurs propriétés des désastres d'un débordement, soit en élevant leurs terrains jusqu'au bord du de la rive, soit par des digues, des chaussées, ou des murs construits sur leur propre sol et hors du lit du cours d'eau, peuvent être exécutés à leur gré. \* \* \* Il est cependant certain qu'il ne peut ainsi refuser le passage aux grandes eaux qu'en les repoussant ailleurs, et par la exposant les autres riverains à supporter les désastres qu'il redoute pour ses héritages, néanmoins, il use d'un droit légitime, il est d'autant moins responsable des conséquences que les riverains peuvent, par de semblables travaux, les éviter; que, s'ils ne le font pas, ils devront s'en prendre, non à ce propriétaire vigilant, mais à leur indolence. *Droit d'Alluvion*, 345.

So Demolombe, reiterating what had been taught by his predecessors with striking unanimity, that a proprietor has a right to protect himself from damage by an overflow by the erection of works on his own land, even though they should cause the overflow to be more hurtful to his neighbor, continues;—Et lors même que l'effet de ces travaux, plantations, digues, ou autres, serait, comme il arrive presque toujours, de rendre les eaux plus hostile et plus dommageable sur autres fonds, les propriétaires de ceux-ci ne seraient pas fondés à se plaindre; car chacun peut en faire autant de son côté; ce droit de préservation et de légitime défense est réciproque; il était impossible que la loi imposât aux propriétaires riverains des fleuves et des rivières l'obligation de laisser dévorer leurs fonds sans pouvoir rien faire pour les garantir. \* \* \* Ces principes, si conformés à la raison et à l'équité, ont été de tous temps reconnus, soit en droit romain, soit dans notre ancienne jurisprudence française; et ils sont encore aujourd'hui consacrés par l'accord unanime des arrêts et des auteurs. *tome 11, No. 30.*

To the plaintiff's demand, the defendant opposes these legal principles which we think protect him from liability for any damage that may have been occasioned by the works erected by him on his own land for his own protection. But he goes further, and maintains that the plaintiff's injury from the overflow occurred, irrespective of any act done by him, the defendant. Turjeon, who speaks intelligently, was on the spot all the time, and was the plaintiff's overseer at the time, says, the water was in the plaintiff's field before the pump began to work, or the dam was removed. This was the seepage water, which got into the plaintiff's field because his levee was bad, as this witness testifies, and besides, the water was passing into the defendant's field before the dam was out. He says distinctly, in his belief, the dam would have been washed away any how, and we (Mallhot's place) would have been inundated, and that if there had not been any levee at all made on Pugh's plantation, the Mallhot place would have been drowned out much faster.

The defendant explained to the plaintiff his whole plan of defence against the back water as early as the first of May. He had formed the plan on 27th. April, and explained it to Mr. Rogers, his overseer, and directed him to set to work to execute it. It was done. The different levees were constructed, and the water that had collected inside of them was drained or forced out by means of the pump, upon the abandoned land outside of his levees. But before the completion of these works, or rather at the very commencement of them, Rogers, finding that the waters were backing up the canal or ditch, which ran parallel with the division line between the two places, but is cut wholly on Pugh's land, without orders, put up a small dam on the canal. This dam was fifteen or eighteen inches above the water, and was not intended to be permanent. During its construction, work was hurrying on the levees. The canal was an open drain for the Pugh plantation, and at the time the dam was placed in it, was the only ditch of that plantation open to the rear. The dam remained until the 12th. of May, when the pump having been erected, and the levees of defendant completed, and the pump ready to start, defendant ordered Mr. Rogers to cut the dam. This was done. At the time of the cutting, under the testimony, it appears the water was running over it twelve or fourteen inches, and had been so running for eight or ten days. The dam cut, defendant's pump started and drained water from the inside of his levees out, and on to the surface of his abandoned land.

The cutting of this dam, and the continued working of the pump, plaintiff alleges, was the direct and immediate cause of the inundation of his land, and the damage to his crops. The waters commenced to rise on April 27th., and commenced to fall on May 22d.

It seems certain that if the dam had not been cut on the 12th., it must have given way under the pressure of the constantly swelling volume of water, but if it could be indubitably established that it would not have given way, plaintiff had a right to cut it. Its temporary location in the canal was intended only to serve a transient purpose, viz to hold the waters in check until the system of connected levees should be completed. Surely the defendant was not bound by any principle of law or ethics, to sit with folded hands, and see his property engulfed by the floods that were spreading like a sea all around him, because the plaintiff did not choose to join with him in a plan of common defence, or did not choose to protect himself by works of his own.

The Code rises into the domain of morals, and stamps an ethical principle with legal sanction, when it declares, that every act whatever of man, that causes damage to another, obliges him to repair it by whose fault it happened. But the act which one has a right to do, and which an imminent peril requires him to do, to avoid a disaster that is



## Mallhot vs. Pugh.

hurrying towards him, is not a fault. And if it were, he who has by his fault contributed to that of the other—who has by obstinacy or bad judgment, or negligence, or indolence, himself been the author of his own misfortunes, and through these or like causes, has contributed to produce the condition of which he complains—cannot invoke in his behalf, and for his indemnification, an equitable principle which was intended to apply only for the benefit of those who are without fault in the particular matters that form the subject of complaint.

The judgment of the lower court is affirmed.

Rehearing is refused.

## No. 7077.

A. F. COCHRAN VS. OCEAN DRY-DOCK COMPANY. JOHN L. STERRY ET AL.,  
THIRD OPPONENTS.

A claim for taxes by the State will not be allowed when there is no proof of its registry or existence.

The city of New Orleans is not entitled to a preference for license dues, unless its claim for the same has been registered.

The lessor of land fronting on a river and leased for dockyard purposes, is entitled to the lessor's privilege on the dock itself, when the dock is attached in front of the land by a permanent staging, and for a permanent purpose.

The stockholders of a corporation have no right to appropriate any part of its assets to pay salaries due them as officers of the company, or due them on any other account, until all creditors, who are not stockholders, have been paid.

**A** PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

*Bentinck Egan* for plaintiff and appellant.

*W. W. King, Horace E. Upton, Sam'l P. Blanc, Hornor & Benedict, and Braughn, Buck & Dinkelspiel* for opponents and appellees.

The opinion of the court was delivered by

DEBLANC, J. Under a writ of *feri facias* issued out of a judgment obtained by plaintiff against defendant, the dry dock and its appurtenances belonging to the latter were seized and sold for \$7300. The proceeds of that sale are in the hands of the sheriff, and the object of this litigation is to regulate, between the creditors of defendant, the distribution of said proceeds.

Who are those who claim to be its creditors?

1. The State of Louisiana, for the taxes of 1874, 1875 and 1876, amounting, in the aggregate, to \$493, and two per cent thereon for attorney's fees. No proof has been introduced of either the existence or registry of that claim, and it should not have been allowed.

26 A. 592.

30	1365
46	1550
30	1365
47	1488
30	1365
108	78
30	1365
110	889

2. The city of New Orleans, for a license of 1876, two hundred dollars. The evidence that such a license was due has not been recorded, and the city is not entitled to a preference which can be acquired—as to third parties—but from the date of the registry prescribed by our constitution and laws. C. 123. 26 A. 80. 350. 592. 28 A. 496.

3. Peter Marcy, as a lessor, \$1836.33, with interest and costs. He—in 1865—leased to one Spencer Field a shipyard fronting on the Mississippi river. The rent of that property, from 1867 to 1875, was paid by the defendant, and it is manifest that—since its formation—the company has had control of that property and has used it for its exclusive benefit. The lease was renewed and extended by its own officers.

Those who oppose this claim contend that the company's dock was in the river, at a distance of sixty or one hundred feet from the bank, and that Marcy had no privilege thereon, because it was not on the property leased by him. The dock was attached in front of said property for a permanent purpose, and connected with it by a permanent staging. Without the yard, the dock would have been useless to the company, and the lessor's privilege did extend to and embrace it.

5 A 36—6 A. 452. C. C. 2705.

4. John G. Follett and Thomas G. Mackie—as also Spencer Field and J. B. Williams—were stockholders in the Ocean Dry-Dock Company, and their liabilities as such must be satisfied before their salaries as officers of said company. The claims of said Follett and Mackie, that of N. C. Folger, as transferee of Spencer Field, and of Francisco Villegas—as transferee of J. B. Williams, may be due, but can be legally paid only out of any balance which may remain of the proceeds in the sheriff's hands, after a full satisfaction of those creditors who are not members of said company and who did not share in the division of its stock. It is in evidence that Follett, Mackie, Field and Williams divided among themselves, in settlement of their salaries twenty-eight thousand dollars worth of that stock.

“The stockholders have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves to the prejudice of the members or creditors. Nor are they entitled to any share of the capital stock, or to any dividends of the profits, until its creditors are paid.

“The property of the corporation in equity is regarded as held in trust for the payment of its debts; and a sale of its capital stock, and a division of the proceeds among the directors, will not defeat the rights of creditors.” 2 R. R. 573. Field on Corporations, §172 and 173, p. 187. Chicago R. R. Co. vs. Howard, 7 Wall. 392. Jackson vs. Ludeling, 21 Wall. 916.

5. C. B. Johnson is the holder of a note of \$1000, signed by Spencer

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Cochran vs. Ocean Dry-Dock Company.

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Field as president. This claim was dismissed by the lower court. The evidence establishes that this note was held by Folger until after its maturity. Spencer Field took it from him and placed it in the hands of the company's attorney for collection against the company. He swore that it was given for a loan from Folger to the company, and that the amount thereof was deposited in the New-Orleans National Bank. The company's cash-book shows no such entry, and the evidence adduced in support of that alleged loan and of the disposition made of the same is as vague as unsatisfactory. The loan was not authorized by a resolution, and two of the managers and directors swore they had no knowledge of it. Johnson was not even called as a witness, during the trial, to sustain his own demand. His silence and the circumstances which surround Field's course as to that note, justify the belief that said note represents a fraction of the claim which he considered he could justly realize from the company. He was—he said—under the impression that—as president of said company—he could not sue in his own name, and we are left under the unremoved impression that he alone has an interest in the judgment obtained by Johnson. That judgment entitles him to only a proportionate share in any balance that may remain to be distributed among the stockholders.

6. As to those creditors who are not stockholders or the transferees of stockholders, and who have caused execution to issue out of the judgments rendered in their favor, they have the privilege which results from their respective seizures and must be paid—after satisfaction of the costs incurred in this case and the lessor's claim—in the order in which their seizures are levied. The creditors to be so paid are A. F. Cochran, A. Martin, G. Lauson, John L. Sterry, Forstall & Delavigne and Peter Fink.

7. After satisfaction of the judgments referred to in the preceding paragraph, the claims of the city of New Orleans, Bentinck Egan and H. Cartens are the next in rank, and must be paid out of the proceeds of the sale; and any balance then and thereafter remaining in the hands of the sheriff, shall be applied to the judgments of C. B. Johnson, Thomas G. Mackie, J. F. Follett and Francisco Villegas, in proportion corresponding to the amounts of said balance and judgments. As stockholders or the transferees of stockholders, after maturity of the transferred claims, the four last-named parties did not and could not acquire any preference over one another.

Of all the appellees, Bentinck Egan is the only one who has asked an amendment of the judgment of the lower court, and we cannot—as suggested—postpone the distribution of the proceeds of the sale, in the interest of those who have not appealed. To do that, we would have to remand the case.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court is amended as follows: Out of the proceeds of the sale retained by the sheriff, and after paying the costs incurred in this case, in this and the lower court, he shall pay the seizing and opposing creditors in the order hereinafter indicated, to wit:

1st. To Peter Marcy, as lessor, the several sums, with interests and costs allowed him by the judgment appealed from.

2d. *In the order of the seizures levied by them*, the judgments obtained by A. F. Cochran, A. Martin, G. Lauson, John L. Sterry, Forstall and Delavigne and Peter Fink, with the interest, and costs to which they are each entitled.

3d. To the city of New Orleans two hundred dollars—to Bentinck Egan five hundred and ninety dollars, to Brady and McLellan two hundred and forty-seven dollars and thirty cents, and to Henry Cartens one hundred twelve dollars and seven cents.

4th. To Francisco Villegas, J. F. Follett, Thomas G. Mackie and C. B. Johnson, the balance of the proceeds of the sale, in proportion to the amount of their respective judgments.

It is further ordered, adjudged and decreed that the opposition of the State of Louisiana is dismissed as in case of nonsuit, and its rights specially reserved, and that—as hereinbefore amended—the judgment of the lower court is affirmed.

Rehearing refused.

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No. 5523.

L. C. PERRET VS. ALICE KING.

A stipulation made by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper, will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

*Labatt & Aroni and W. F. Mellen* for plaintiff and appellant.

*Wm. O. Denégre and Chas. E. Schmidt* for defendant and appellee.

The opinion of the court was delivered by

MARR, J. In March, 1869, the plaintiff, appellant, instituted suit against Charles A. Weed, the owner of the "New-Orleans Times," a newspaper conducted by him, to recover \$10,000 damages for libel. There was a verdict and judgment in favor of the defendant in that suit. Plaintiff appealed; and in March, 1873, this court reversed the judgment of the district court, and awarded to plaintiff \$15,000 in dam-

## Perret vs. King.

ages against Charles A. Weed, proprietor of the newspaper styled "The New-Orleans Times." 25 An. 170.

In December, 1872, Weed was indebted to Mrs. Alice King, his vendor, in a sum exceeding fifty thousand dollars, on account of the price of the "Times" establishment; and he owed other debts, one to J. H. McKee for \$7000. On the 13th December, he sold the entire "Times" newspaper establishment to Mrs. King, with all the assets, in consideration of which Mrs. King assumed the payment of "all the outstanding liabilities of the said newspaper known as the New-Orleans Times."

She also agreed to pay the debt due to McKee, and to cancel and return Weed's three notes in her favor, owned and held by her, each for \$25,000, on one of which \$20,000 had been paid.

This suit was brought to recover of Mrs. King the amount of the judgment in favor of plaintiff against Weed, with interest and costs, upon the allegation that it was one of the outstanding liabilities assumed by her in her agreement with Weed.

In her answer Mrs. King, after general denial, and admission that she was the owner of the "Times," specially denied that she had ever "stipulated or contracted or agreed to assume the payment of plaintiff's claim against C. A. Weed."

There were objections taken and reserved to portions of the parol testimony offered on the trial, which it is not necessary to notice now. This testimony tended to show what liabilities Mrs. King had assumed. The agreement offered in evidence was a copy published in the "Times" newspaper. The original had been lost or mislaid: and it differed from the original only in that there was attached to the original a list of the liabilities to be paid by Mrs. King.

*Prima facie*, this assumption by Mrs. King would be limited to what the parties understood as debts incurred in and about the conducting of the paper. Mrs. King's object was, manifestly, to secure, as far as she could, the large sum due to her on account of the price; and Weed's object was to rid himself of his personal liability for the debts which were acknowledged to be due, and which he desired to have paid. Whatever might be the amount so assumed by Mrs. King, it would diminish to that extent the net value of the establishment to her; and it would diminish the sum which would otherwise have been applicable to Weed's other debts, or to his other purposes, in the event that the value of the establishment was in excess of the debt due to Mrs. King.

It does not appear at what date, precisely, the verdict and judgment in favor of Weed were rendered; nor when the appeal was taken: but the case was pending on appeal in December, 1872, when Mrs. King became the proprietor. The proprietor of a newspaper, sued for libel,

would not rank that claim as one of his debts, nor would he, in disposing of his property, be inclined to reserve from the price a sum sufficient to cover such demand. He could not know, nor could the purchaser know, what amount might be awarded. The demand was for ten thousand dollars, with interest from March, 1869, and costs; so that if the seller had understood, and the purchaser had understood, that such demand was to be treated as part of the price, and assumed by the purchaser, the amount reserved would have been in excess of \$10,000.

In this case there was a verdict and a judgment in favor of Weed, exonerating him from liability. The appeal did not set aside that judgment; and it would require very positive proof to show that either Weed or Mrs. King allowed this claim to enter into their estimation. Weed wished to pay what he considered his debts, liabilities. The books of the "Times" establishment showed the amount of the liabilities and of the assets: and an agent of Mrs. King had been in the office, "in possession of the whole newspaper, as the representative of Mrs. King," from the death of her husband. Weed desired to avoid being forced into bankruptcy. The "Times" establishment had been seized for the debt due McKee; and it was necessary to make some arrangement by which Mrs. King could be protected, and the threatened bankruptcy avoided. This agreement was the result of that condition of affairs.

If one should read the assumption clause in the agreement between Weed and Mrs. King, and the petition and answer in this case, and the decision of this court in March, 1873, as reported in 25 An. 170, his impression would be that a judgment against Weed, who had been the proprietor of the "Times" newspaper, for damages for a malicious libel, was not one of the outstanding liabilities of the "said newspaper" in December, 1872, when Mrs. King again became the proprietor. In libel suits the verdict of a jury in favor of defendant creates a very strong presumption of the absence of right to recover. The debts and liabilities of the newspaper, in general business parlance, would be construed to be such as created some legal or equitable right or lien upon the property, the types, presses, stock, etc.: such as wages, sums due for paper and other materials and supplies, and the salaries of editors and writers. There was no lien or equitable right upon the property, more especially against the vendor, Mrs. King, in favor of the plaintiff, who had been injured in his feelings, perhaps in his reputation, by the malicious wrong of Weed; and the interpretation which would make Mrs. King liable to plaintiff in this case, on the assumption in her agreement with Weed, is not that which the language necessarily imports; nor is it either just or reasonable.

If the case be considered without reference to the testimony objected to, the pretensions of plaintiff would be so extraordinary that they

## Perret vs. King.

could not be allowed. We think, however, it was competent to prove by the testimony of Green, who kept the books, who was Mrs. King's representative, and by Mr. Hunt, who, as her attorney at law and in fact, made the agreement with Weed in her behalf, that there was a list of debts, an estimation of the liabilities to be paid by Mrs. King, with reference to which this contract was made; and that the claim of plaintiff was not considered or taken into the estimation by either party.

The judge of the district court concluded that the liabilities of the newspaper, assumed by Mrs. King, in the absence of proof to the contrary, would be those arising *ex contractu*, not such as arose *ex delicto*; and this is our view of the law, and our interpretation of the agreement.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

## No. 7063.

## THE NEW-ORLEANS CANAL AND BANKING COMPANY VS. THE CITY OF NEW ORLEANS. W. VAN NORDEN, INTERVENOR.

So much of section second of the act No. 41 of 1877 as provides "that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby canceled and annulled," and so much of the first and second sections of said act as exclude certain lands from the limits of the drainage district and exempt them from all future drainage assessments, impair the obligations of existing contracts and are unconstitutional.

The Legislature can not so alter the charter of a corporation as to affect the rights of third persons previously acquired under the charter.

The city of New Orleans can not be compelled to re-imburse the drainage taxes voluntarily paid to the Drainage Commissioners, and actually expended for drainage purposes.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

*G. L. Bright* for plaintiff and appellee.

*B. F. Jonas*, City Attorney, and *Sam'l P. Blanc* for defendant and appellant.

*Lacey & Butler* for W. Van Norden, intervenor.

The opinion of the court was delivered by

DEBLANC, J. In 1858, several draining districts were established in the parishes of Orleans and Jefferson, and a Board of Commissioners appointed for each of said districts, for the purpose of reclaiming the swamp lands therein situated. To defray the construction of the works necessary to execute that *projet*, an assessment was to be levied by the commissioners, and the payment of the assessed contribution was secured by a first mortgage and privilege on the lands so situated.

Before 1877, plaintiff paid, for the intended drainage, twenty five thousand five hundred ninety eight dollars and sixty one cents, the whole of the assessments levied upon the lands it owns in the first drainage district, and now seeks to recover back that amount, on the grounds:

1. That the consideration for which it was paid has entirely failed.
2. That, by act No. 48 of the General Assembly of 1877, its lands have been excluded from the drainage districts and from the benefits of drainage.
3. That—by one of the provisions of the aforesaid act—all judgments obtained for drainage in the several districts herein mentioned, and creating liens on the lands therein comprised, and all legal proceedings instituted for that object, have been annulled and canceled.

To plaintiff's demand the city answered:

- 1st. By a general denial.
- 2d. That the assessments paid, and the re-imbursement of which was demanded, were all paid under a judgment rendered in "the matter of the Board of Commissioners of the Second Drainage District, by the Second Judicial District Court, which judgment was *res judicata* and a perpetual bar to any reclamation.
- 3d. That plaintiff had voluntarily paid said assessments now reclaimed.
- 4th. That the judgment rendered in the matter of the New-Orleans Canal and Banking Company vs. City of New Orleans, No. 3375, of Fifth District Court for the Parish of Orleans and known in the Supreme Court as No. 4350, formed *res judicata* and was a bar to plaintiff's demand.
- 5th. That plaintiff had never paid any part of its assessment to the city of New Orleans; but had paid all to the Board of Commissioners of Drainage for the First Drainage District, long before act No. 30, of 1871, had made the city officers the collectors of the "drainage tax," and such payments had all been expended in drainage work.
- 6th. That the city of New Orleans was not authorized nor empowered by any law to raise money for, or to pay, such as the plaintiff's demand.
- 7th. That act No. 48, of 1877, was contrary to sections 103, 109 and 110 of the State constitutions of 1852, 1864 and 1868, respectively, and of section 3, article 6; article 5 of amendments of 1791; of section 10, of article 1, and section 1, of article 14 of the Constitution of the United States, in that it impaired the obligation of contracts and divested vested rights in this wise. That under act 30, of 1871, a large amount of drainage work had been done, in payment of which drainage warrants had been issued; that subsequently, under act sixteen, of 1876,



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New-Orleans Canal and Banking Company vs. City of New Orleans.

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and pursuant to city ordinances, the city of New Orleans had purchased the franchises to do the drainage work and great quantity of machinery, boats, etc., for such purpose, for all of which it had paid in drainage warrants. That these warrants, to a very large sum, were issued on the faith of the drainage tax, were only payable therefrom. That the withdrawal of any part of the tax, the destruction of any of the sources whence it must be drawn or the loss of the security found alone in the judgments and liens obtained for the collection of the same, impaired the obligation of such contracts and divested vested rights.

8th. That said act 48 of 1877, was further unconstitutional, because it destroyed uniformity and equality of the tax or assessment, relieved many in the taxing district from the obligation they were bound to share in common with all; imposed double taxation on those not so relieved and was partial legislation, all contrary to articles 123, 124 and 118, of State constitutions of 1852, 1864 and 1868, respectively, and the aforesaid articles of the constitution of the United States.

Section 2d, of act 48, regular session of 1877, is as follows:

"That all judgments for drainage of said lands, judgments creating liens, and for assessments for drainage of said lands, and all legal proceedings pending therefor, be and they are hereby cancelled and annulled; *provided*, that the benefits of this act shall not be invoked in favor of any land until the State and city taxes due thereon are paid: *provided further*, that all lands situated within the above described lines, and excluded by this act from the drainage limits established under previous laws, and upon which drainage taxes or assessments have already been paid, shall hereafter be exempt from all future drainage assessments."

By the act of 1858, No. 165, "to provide for leveing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," three draining districts were established, and a Board of Commissioners for each district. The Board of Commissioners were invested with all the rights and powers necessary to drain the several districts. It was made their duty to cause plans of the sections or districts to be drained to be made and deposited in the office of the recorder of mortgages—to apply to a district court for a decree that each portion is subject to a first mortgage lien and privilege in favor of the Commissioners for such amount as may be assessed on the property for its proportion of drainage.

They were then authorized to levy an assessment upon the superficial square foot to defray the construction of the work. A remedy for its collection was given.

The first section of act No. 51 of 1869 provides, that the three drainage districts are consolidated, the property of the three draining dis-

tricts are transferred to the mayors of New Orleans, Jefferson City and Carrollton and the police jury of the parish of Jefferson, left bank, and "all other property, such as maps, plans, tableau, all books pertaining to the business of said draining districts, all moneys and credits, deeds, mortgages and all other evidences of title to real estate and all assessments of taxes, etc., shall be turned over by the Commissioners of said drainage districts, to the Commissioner of Drainage whose appointment is hereinafter provided for."

The second section provides for the appointment of Commissioner of Drainage.

The draining of the several districts was and continues to be but one, a common and indivisible enterprise. Every canal, ditch or levee necessary to complete it, must be dug or built, not at the costs of only a fraction, but at the costs of every fraction of each of said districts: otherwise, it might happen that those who have not, or who have the less contributed to the partial execution of the common enterprise, would alone benefit by the partly accomplished work paid for by others.

If, considering the *projet* an impracticable one, the Legislature had repealed every law providing for the drainage of lands in the parishes of Orleans and Jefferson, its action would not have amounted to a violation of the constitution, but the Legislature could certainly not select, within the limits of the districts which—for nearly twenty years—have been subjected to the burdens of that common enterprise, lands which shall and others which shall not continue to bear the already imposed, fixed and determined burdens, much less could it ordain and command that the mortgages and privileges which are—not an exclusive pledge of the State—but the pledge of the creditors of the several districts, and—indirectly at least—of those who have paid the assessed contributions, shall be remitted, cancelled and annulled.

Were it to the interest of the State, the city or those concerned in said enterprise, that the territorial limits of said districts should be reduced, that reduction could—in no way—authorize even the Legislature to distinguish between the lands embraced within the limits as originally fixed, to exclude a portion of said lands from the benefits of the proposed drainage, and to exempt the excluded portion from the charges and liabilities actually incurred for work already done, determined and accepted. These liabilities and benefits must be borne and shared by all.

We unhesitatingly acknowledge—as contended by plaintiff's counsel—that the whole of the expense of an improvement may be imposed by the Legislature, not on merely the owners of the property to be specially benefitted by the improvement, but on the whole of the corporation. This it can do, when the entire corporation is to be thereby

benefitted—but we as unhesitatingly deny that the Legislature can—lawfully—order, in any specified locality, a work of admitted and general utility to every portion of the same, and arbitrarily ordain that—to pay for the price of that public work—a tax shall be levied on exclusively the eastern section of that locality.

It is manifest that so much of the second section of act No. 48 of the General Assembly of 1877, which provides “that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby cancelled and annulled,” and so much of the first and second sections of said act which exclude certain lands from the established limits of the drainage districts and exempt them from all future drainage assessments, impair the obligation of existing contracts, destroy acquired rights and violate the letter and spirit of our constitutions.

The debt legally contracted by or for the three districts is a collective debt, secured by a proportionate charge imposed on every tract of land included within their well-defined boundaries, and—until that debt be paid, or its invalidity judicially assailed and judicially decreed, in a proper suit, against the proper parties, and on proper evidence, the imposed charge shall continue to subsist. The Legislature has not, and cannot lawfully exercise the extraordinary prerogative of ordaining that the indisputable obligation of one hundred parties, shall—though not reduced in amount—cease to exist as to ninety of those parties, and—by an arbitrary enactment—declare it to be and make it the obligation of the remaining ten.

“The requirement of apportionment is *imperative*. And whenever the tax is a direct levy on property, there must be a taxing district. Given a tax and a district, then the sum demanded of any one person, or laid upon any one parcel of property must have a *fixed* relation to the whole tax, as well as to that demanded of every other person or laid upon every other piece of property.” Cooley, Taxation, p. 159; Henry vs. Chester, 15 Vt. 460; Tide Water Co. vs. Coster, 18 N. J. Eq., 518. See, also, Wilson vs. Supervisors of Sutter, 47 Cal. 91; Woodbridge vs. Detroit, 8 Mich. 274, 309.

“Though the districts are established at the discretion of the Legislature, the basis of apportionment which is *fixed upon must* be applied *throughout* the district.” Cooley, Tax., 180; O’Kane vs. Treat, 25 Ill. 557, 561; Fletcher vs. Oliver, 25 Ark. 289.

“There cannot be two rules of apportionment for the same district; if there could be, there might be any number, and in effect there would be none at all, and every man might be assessed arbitrarily.” Cooley, *Ib.* 180; Tide Water Co. vs. Coster, 18 N. J. Eq. 518.

Burroughs holds "that the Legislature may, at any time, alter or modify the powers of municipal corporations: but when under the exercise of powers delegated, the rights of third persons have accrued, and they have assumed the form of a contract with the corporation, the Legislature can not change the powers of the corporation so as to impair the rights of its creditors. The Constitution of the United States prohibits the States from enacting any law impairing the obligation of the contracts, and while the Legislature may alter or modify the powers of the subdivisions of the State, such alteration can not be allowed to affect the creditors of such subdivisions. They are entitled to claim that the corporation shall exercise such powers as it had at the time the contract was made. One of the classes of cases cited is when—after the subscription and issuing of bonds, the rate of taxation by the corporation is limited. In such cases the limitation does not affect the right of the creditor to have a levy made to pay his debt, although it may be necessary to exceed the limit. The operation of the act is prospective; and it cannot be construed retrospectively, so as to deprive the creditor of the right to the levy as it existed when the contract was made."

B. p. 427—4 W. 535—9 W. 477—25 Wis. 122—31 Penn. 175—51 Ill. 147—45 N. Y. 234—6 Kansas 256—25 Cal. 638.

"It is not in the power of the Legislature, under the guise of taxation, to give the property of A to B, or to impose the whole burden of a tax for the State upon one county," and—for the same reason—the burden of a tax for a county on entirely one of its sections. "It is wrong that the whole should be taxed for the benefit of the few, and equally wrong that the few should be taxed for the benefit of the whole." Burroughs p. 22. The improvement necessary or indispensable to, and undertaken by a district, must be—not merely commenced—but executed either in whole or in part by the entire district. Unless or until all are relieved by the execution or failure of the undertaking, or—according to circumstances—by the satisfaction of the full or proportionate share of their liability, all are and remain bound.

We find, in the record, that—in the excluded district—the assessments already paid amount to upwards of two hundred and forty thousand dollars, and that but an insignificant fraction of that large sum has been received by the city and its officers. Is it liable for the reimbursement of the whole or of any part of that amount?

Were we to consider, as conclusive evidence, the declarations contained in acts of the Legislature, that the districts have not been protected from overflow, that the laws enacted for their drainage have failed in their purposes, would that be sufficient to establish that the work contracted for and done, in furtherance of the *projet*, has not

been performed at all, or not performed according to the terms of the contracts, and that every outstanding warrant given as the price of that work is without consideration? Would those declarations—if taken as evidence—be sufficient to authorize the court to pronounce, in this suit, that in whosoever hands those warrants may have passed, and whether those by whom they are held and due be or not before us, they are invalid and void, worthless as to the creditors, binding on no one, and that every guarantee, mortgage and privilege securing their payment must be cancelled, erased and destroyed? We believe not.

Judge Dillon—in his book on municipal corporations—states as follows the general rule in regard to the recovery of taxes already paid: to justify the claimant's action, three principal facts must concur:

“The authority to levy the tax must be *wholly wanting*, or the tax itself wholly unauthorized; in which cases the assessment is not simply irregular, but *absolutely* void. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit of the State, or other public corporation or person; and 3, the payment by the plaintiff must have been made *upon compulsion*, to prevent the immediate seizure of his goods or the arrest of the person, and *not voluntarily*. Unless these conditions concur, *paying under protest* will not give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court.”

The taxes, the amount of which plaintiff seeks to recover from the city, were assessed and collected under the authority of several acts of the Legislature; and every cent of the drainage assessment paid by plaintiff to the city, was paid without compulsion and applied to the satisfaction of drainage warrants. As to the most of the drainage taxes levied on plaintiff's land, they were received and disposed of by the Board of Commissioners, and neither in law nor in equity, can the city be held liable for their application, misapplication or re-imbusement.

We conclude that plaintiff has not shown that its drainage taxes were levied and paid without consideration, and that it was shown—in so far as defendant is concerned, that said taxes were voluntarily paid and properly disposed of. Under these circumstances, plaintiff cannot recover.

As no decree based on any of the pleadings could have—in any way—affected or impaired the alleged rights of Warner Van Norden, his intervention has no legal ground to stand upon.

It is—therefore—ordered, adjudged and decreed that the judgment of the lower court in favor of plaintiff and against the city of New Orleans, rendered on the 17th and signed on the 22d of January 1878,

be and it is hereby annulled and reversed, and that—in lieu of it—there be judgment in favor of the city of New Orleans and against the plaintiff, rejecting the latter's demand.

It is further ordered, adjudged and decreed that the intervention of Warner Van Norden be dismissed as in case of nonsuit: the costs of the appeal to be paid *in solido* by plaintiff and intervenor—and those of the lower court, by Van Norden as regards the intervention, the others by plaintiff.

Rehearing refused.

No. 5779.

SAMUEL & A. W. SMITH VS. CRESCENT CITY LIVE-STOCK LANDING AND  
SLAUGHTER-HOUSE COMPANY.

The *bona fide* sale of the stock of an incorporated company, coupled with a power of attorney to the vendee to transfer it on the books of the company, is made complete by the delivery to the vendee of the certificate of stock. It is not necessary to the perfection of the sale, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on its books.

**A** PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

*Henry C. Miller* for plaintiff and appellee.

*Hornor & Benedict* and *Thomas J. Semmes* for defendants and appellants.

The opinion of the court was delivered by

MARR, J. In February, 1872, Samuel and Andrew Smith purchased of C. Mehle & Co. one hundred shares, reduced to fifty, of the capital stock of the Crescent City Live-Stock Landing and Slaughter-House Company; and of C. Mehle ninety shares, reduced to forty-five. The purchasers paid the price, the current market rate; and the two certificates representing these shares were delivered to them, with two powers of attorney, in each of which there was a blank for the name of the person to whom the transfer was to be made, authorizing Charles Kilshaw to transfer, on the books of the Company, the shares standing in the names of C. Mehle and C. Mehle & Co., respectively.

A by-law of the corporation we presume, we do not find it in the charter, provides that "all transfers of stock shall be recorded in the office of the said company, in a book of transfer to be kept for that purpose:" and the two certificates in question state that the shares are transferrable only on the books of the company, in the one case by C.

30 1378  
45 74  
30 1378  
51 1474  
30 1378  
105 711  
105 712  
30 1378  
114 325  
114 327  
30 1378  
125 147

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Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company.

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Mehle & Co. or their attorney, in the other by C. Mehle or his attorney, on the surrender of the certificates.

It appears that no notice was given to the company, and there was no transfer on the books of the company; but the certificates and powers of attorney remained in the possession of the purchasers from the date of the purchase.

Some time after this purchase, the Bank of America, a judgment creditor of C. Mehle and C. Mehle & Co. *in solido*, seized these shares of stock as the property of their debtors, under execution and garnishment in the hands of the company; and they were sold by the sheriff and adjudicated to Thomas Serrill. Thereupon Samuel and Andrew Smith brought this suit to enjoin the transfer of the stock to Serrill; and they prayed that they be decreed to be the lawful owners, and be recognized as such by the company. In consequence of this suit Serrill did not pay the price of the adjudication.

The district judge perpetuated the injunction granted *in limine*; and decreed that the Smiths be recognized to be the owners of the stock; and that it be transferred to them on the books of the company. From this judgment the company, Serrill, and the Bank of America appealed separately.

The question is, whether the title and possession vested in Samuel and Andrew Smith, by the delivery of the certificates and the powers of attorney to make the transfers on the books of the company, so that the stock was no longer subject to seizure, under execution, as the property of C. Mehle and C. Mehle & Co., the judgment debtors.

The appellants maintain that the certificates of stock are not negotiable; and that there was no such delivery to the Smiths as the law requires, because there was no transfer on the books of the company, and no notice given to the company. They rely on articles 2643 and 3160 of the R. C. C., the first of which declares that "the transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place": and the latter provides that "when the thing given in pledge consists of a credit not negotiable," the proof of the pledge must be by authentic act, or by act under private signature duly recorded, and a copy of the act must have been duly served on the debtor of the credit given in pledge." They also cite and rely upon *Harris vs. the Bank of Mobile*, 5 An. 538.

The law requires tradition in order to make the sale of a thing complete as to third persons; and delivery is an indispensable condition of the contract of pledge. Whatever would constitute delivery, under the contract of sale, would be also a delivery under the contract of pledge, and *vice versa*.

The Civil Code required certain formalities, for the contract of pledge,

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Smith vs. Crescoent City Live-Stock Landing and Slaughter-House Company.

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among others a notarial act, or an act under private signature registered in the office of the notary, containing an accurate description of the thing pledged. These formalities were obstructions to commerce ; and were felt as a serious inconvenience. In 1852 the Legislature passed an act relative to pledges, which was re-enacted in the general compilation of 1855, and in the Revised Statutes of 1870 ; and was incorporated in the R. C. C., art. 3158. The first section provides that " When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned ; and such pawn, so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith."

By section three of this act, the substance of which is in the R. C. C., article 3160, and was in the Civil Code, article 3127, " If a credit not negotiable be given in pledge, notice of the same must be given to the debtor."

The stock in an incorporated company is not a debt due by the corporation to the corporators ; nor is it a credit of which the corporation is the debtor. The corporators in the aggregate own the stock, according to their respective shares and portions ; and it can no more be said that the shares of a corporator constitute a credit, a debt due to him by the corporation, than it could be said that the joint owners of a house or a ship are the debtors of each for his share.

It was well said in *Harris vs. the Bank of Mobile*, 5 An. 539, that the officers of a corporation are the keepers and possessors of the undivided property of the corporation for each and all of the stockholders ; and the certificates of stock are the evidence of the ownership of that property in the hands of the holders. The word " credit " is used in the act of the Legislature and in article 3160 of the R. C. C. to signify a debt, something due to one person by another ; a right on the one part, and an obligation on the other, which create the relation of debtor and creditor between the two persons. It is clearly not applicable to the shares in an incorporated company, which do not constitute a debt, and of which no one is the debtor.

The second clause of article 3158, section one, of the act of the Legislature, authorizes the pledge of notes, bills, stocks, obligations, or claims upon other persons, by the delivery of the notes, or bills, or certificates of stock, or other evidences of the claims or rights so pawned, without further formalities. If the thing so pawned or given in pledge be a credit, a debt not negotiable in the legal sense of the term, due to the pledgor by another who is his debtor, then the pledge is not valid against third persons unless that debtor has been served with notice.



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Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company.

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The R. C. C., treating of the tradition or delivery of the thing sold, declares that "The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer": article 2477 ; and, according to article 2481 : "The tradition of incorporeal rights is to be made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser, with the consent of the seller."

We have in this case all the requirements of these two articles for perfect tradition. The certificates of stock were the evidences of ownership, the titles of the incorporeal rights represented by them ; and these certificates were delivered to the purchasers. The powers of attorney to Kilshaw, who was acting merely for the Smiths, authorizing him to make the transfers on the books of the company, were coupled with an interest which made them irrevocable. They constituted the acts of transfer, as between the sellers and the purchasers ; and no other act was necessary, or could have been required of the sellers, to divest themselves of title and possession. Having the certificates in their possession, the purchasers had a complete guaranty that the corporation could not transfer the stock to their prejudice, since the corporation had bound itself to hold these shares subject to transfer by the sellers or their attorneys, on the surrender of the certificates. By producing these certificates, and the powers of attorney, the Smiths could have compelled the corporation, at any time, to have the transfers made on their books ; and the corporation had no power to transfer to any other than the holders of these certificates and the powers of attorney. The thing sold, therefore, had passed beyond the power and control of the sellers, and into the power, possession, and control of the purchasers.

Articles 2642, 2643, of the R. C. C. relate exclusively to the transfer of credits, rights, or claims against a third person. The word "to," as used in article 2642, is a mistranslation of the word "sur," in the Code Napoleon, article 1689, from which it was copied literally into our Code. The word "to" does not make sense ; and the whole context shows that the article is dealing only with the credits, rights, and claims which the transferor has upon or against a third person who is his debtor with respect to such credit, or right, or claim.

Article 2643, which requires notice to the debtor of the transfer having taken place, is clearly not applicable to all the credits, rights, and claims referred to in article 2642. Promissory notes and bills of exchange, essentially negotiable, pass to the transferee without notice to the debtors, the makers, accepters, drawers, indorsers ; and yet they are credits, rights, claims upon or against third persons. Article 2643, therefore, must be restricted to such credits, rights, and claims as create the relation of debtor and creditor between the transferor and him who owes, is bound to acquit these credits, rights, and claims ; and it must

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Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company.

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also be restricted to such credits, rights, and claims as are not evidenced by a negotiable instrument.

The by-law which requires transfers of stock to be recorded on the books of the corporation regulates merely the respective rights of the corporation and the individual stockholders. No one can claim to be a stockholder, and to exercise the rights of a corporator, in virtue of a sale of stock to him, until the corporation has taken cognizance of the sale, and, by transfer on its books, has substituted the purchaser for the seller. Whether one has acquired the character and the rights of a corporator, is a question to be determined by the laws of the corporation. Whether a purchaser has acquired a good and perfect title to any property or thing, tangible or intangible, is a question to be solved by the general laws of the State applicable to the sale and transfer of such objects. Samuel and Andrew Smith may not be corporators in this company, by reason of their neglect to comply with the requirements of the charter and by-laws; but they may, nevertheless, be the owners, by perfect titles, of the shares of stock purchased by them.

In *Bank vs. Lanier*, 11 Wallace, 369, the Supreme Court of the United States had occasion to consider the effect of a stipulation in certificates of stock almost identical with that in the two certificates in this case, that the stock should be transferrable only on the books and on surrender of the certificates. The court regarded the power to transfer their stock as one of the most valuable franchises that could be conferred on corporations, and said that no better form of certificate could be adopted to assure the purchaser that he can buy with safety. "He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise."

The court went on to say that this certificate was "a notification to all persons interested to know that whoever, in good faith, buys the stock, and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificate."

We understand this to be settled law in New York, Connecticut, and New Jersey; and we do not think the law could be different elsewhere, in the absence of positive legislation to the contrary. The distinction is plain between the requirements of the law in order that title and possession shall vest in a purchaser, and the requirements of the charter and by-laws of a corporation in order that the holder and owner of a title to shares of the stock shall receive from the company a certificate of own-

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Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company.

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ership, in his own name, and be admitted to the rights and privileges of a corporator.

There is an immense amount of the wealth of the country invested in stocks of the numberless corporations which have sprung into existence within a few years past. These stocks afford a most convenient and valuable basis of credit; and they are sold to a large amount daily, at all the great commercial centers. The holder who does not wish to sell may pledge his certificates for loans and discounts to an amount approximating their market value, with a reasonable margin for possible depreciation. The pledgee does not desire to become the owner of the stock; and he would not think it necessary, nor would he have the right, to surrender the pledged certificates and have the stock transferred to him on the books of the corporation. Nor do we think the validity of the pledge could be made to depend on the giving of notice to the corporation, because the corporation has no power or authority to dispose of the stock, or to transfer it, so long as the certificates are not produced and surrendered. If the pledgee were required to have the transfers made on the books of the corporation, or to give notice, the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicile of the corporation.

We entertain no doubt but that the act of 1852 was designed for the public convenience by facilitating the pledge of stocks and other securities; and it required nothing more for the perfection of the contract than the delivery of the certificate of stock. But if this suffices for the perfection of this contract, it is because the delivery of the certificate is the only delivery that can be made of the stock which it represents; and that delivery is effectual, whether it be under the contract of pledge or the contract of sale.

The certificates in this case are in the usual form: a form which has been adopted throughout the United States, as well for the benefit of corporations, by encouraging investments in stocks, as in the interest of the public, to make these stocks a secure basis of commercial transactions, whereby their value is enhanced. These certificates are not promises to pay: they contain no words of negotiability, and they are not negotiable, in the ordinary sense of the term; but, as the court said in *Lanier's case*, 11 Wallace, 377: "Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. They have become the basis of commercial transactions in all the large cities of the country, and are sold in open market, the same as other securities."

We find nothing in *Harris vs. Bank of Mobile*, 5 An., which militates against the views we have expressed. That case is not applicable to

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Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company.

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this, because the title under which Harris claimed the stock seized by the bank was acquired more than four months after the seizure; and it was alleged that his title was simulated and fraudulent, as it afterward was proven to have been. *Bank of Mobile vs. Harris*, 6 An. 811.

This case is not complicated by any question of fraud or simulation in the title under which the purchasers claim, nor of pre-existing right in the seizing creditor. On the contrary, the purchase was made in good faith, at the current market rate, and in the usual course of business; and the evidences of title and the power to transfer were delivered to the purchasers long before the seizure. The title thus acquired was as complete as the nature of the objects of the purchase would admit of; and the subsequent seizure by a judgment creditor of the sellers was without effect, and it can not defeat or impair the right of the purchasers to have the shares of stock transferred to them on the books of the corporation, in accordance with the terms of the certificates and powers of attorney held by them.

The judgment appealed from is, therefore, affirmed with costs.

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No. 6661.

U. OZANNE VS. ABRAHAM HABER.

A promissory note which has for its consideration the discontinuance, by the holder of the note, of certain criminal proceedings instituted by him against a party for obtaining money under false pretenses, is void.

**A** PPEAL from the Sixth District Court, parish of Orleans. *Rightor*, J.

*Labatt & Clinton* for plaintiff and appellant.

*Braughn, Buck & Dinkelspiel* for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon three promissory notes, aggregating one thousand and thirty-nine 50-100 dollars, each having these words after value received "as per agreement made this day between A. Haber and U. Ozanne." The defendant is sued as indorser. The defence is fraud, and want of consideration.

The plaintiff, residing at Sardis, Miss. had made an affidavit against one Collins for obtaining money under false pretences, and had obtained a requisition from the Governor of that State upon the Governor of Louisiana, and had secured the arrest of Collins in New Orleans, and imprisoned him for safe keeping until he could be sent back to Mississippi. Collins had inveigled Ozanne into an advance of money for the furtherance of an enterprise, which he had conceived. He had discovered

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Ozanne vs. Haber.

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a process by which rags were to be converted into wool, had patented this process as he represented, and was sure large and remunerative returns were in store for any one who had the sagacity and the nerve to embark in the venture. Ozanne was to share all the profits. Having obtained all he could from Ozanne, Collins came to New Orleans and was even more successful with the defendant Haber, who had become so captivated with the scheme that he had invested about four thousand dollars in the purchase of machinery for a factory to put the patent to practicable use. The invention was a chemical process by which rags were to be reduced to, or converted into wool by dissolving the vegetable fibre, and leave the animal fibre intact. This is the description of one of the witnesses.

When Ozanne, the plaintiff, came to New Orleans to get Collins and carry him back to Mississippi under the Governor's requisition, he found the defendant Haber in the full tide of successful experiment with Collins' patent. Haber was not willing that the inventor should be taken away from the field of his labour thus summarily. The result was that Haber gave to Ozanne the notes now in suit, the notes having been drawn by Collins in favour of Haber, and by him endorsed, upon Ozanne's transferring to him all his interest in Collins' discovery, and agreeing to dismiss the criminal proceedings against Collins, and leave him here. This is the agreement that is referred to at the end of each note.

This agreement recites that for and in consideration of these notes, Ozanne transfers all his interest in the contract with Collins to Haber, and agrees to dismiss the criminal proceedings at his own expense, and adds; "I, by these presents, voluntarily and freely withdraw all the criminal charges made by me against said Collins for obtaining money under false pretenses, the amount of money obtained having been secured to me by one A. Haber."

We do not think we can enforce this agreement, or give judgment on the notes which form its consideration. Story says a promissory note will be void if the consideration is, in whole or in part, illegal. It may be illegal either because it is against the principles and doctrines of the common law, or because it is specially prohibited by statute. The former illegality exists wherever the consideration is founded upon a transaction against sound morals, public policy, public rights, or public interests, as for example contracts of any sort made with an alien enemy; contracts in general restraint of trade or marriage; contracts for the perpetration, or concealment, or compounding of some crime. *Prom. Notes*, § 187.

Another writer is to the same effect thus;—Considerations impeding the course of public justice, as dropping a criminal prosecution for a felony, or a public misdemeanor, or suppressing evidence, are illegal

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Ozanne vs. Haber.

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considerations. Byles on Bills, 218. The principle is well established, and is constantly applied.

The plaintiff, having made an imprudent venture, found himself deceived, and his money gone, and for the purpose of getting it back, resorted to criminal proceedings, which he hoped would extort it from the man who had played upon his credulity. Finding the defendant in the meshes, from which he was endeavoring to extricate himself, he availed himself in turn of the defendant's delusion, and took his notes to reimburse himself, promising to release the criminal as a consideration therefor.

The lower court thought he was not entitled to recover upon notes given for such a purpose, and so think we.

Judgment affirmed.

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No. 5714.

OSCAR ALLEN VS. THE MERCHANTS' MUTUAL INSURANCE COMPANY.

Where in a contract of insurance which covers a storehouse, and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house, or the goods, in another company, without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.

**A** PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

*Isaiah Thorp* for plaintiff and appellee.

*A. & W. Voorhies* and *Hornor & Benedict* for defendants and appellants.

The opinion of the court was delivered by

MANNING, C. J. This is an action upon a policy of insurance against fire. The claim is for six thousand dollars on a stock of furniture in the frame slated store on the corner of Magazine and Sixth streets, and one thousand dollars on furniture in a frame slated warehouse in its rear.

The defendant pleads in bar of recovery, that the policy is vitiated by the violation of that clause requiring written notice to be given it of insurance in other companies, and avers that the plaintiff insured the same property in the Lafayette insurance company, and failed to give notice thereof to the defendant.

The policy contains this clause; "And provided further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and

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Allen vs. the Merchants' Mutual Insurance Company.

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mentioned in or endorsed upon this policy, then this insurance shall be void, and of no effect, and if the said insured or his assignees shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no effect."

The policy is dated Nov. 22, 1871 and was renewed every year to the same date 1874. On February 13, 1874 the plaintiff assigned his right in the policy to Mrs. Balser to the extent of \$1,180. which the company approved, and the suit is to recover her interest as well as the plaintiff's. On July 18, 1874 the plaintiff insured in the Lafayette company for two months for two thousand dollars, and the property is described in that policy as "stock of ready-made furniture contained in the two-story frame slated building situate on southeast corner of Magazine and Sixth streets."

The law upon the vitiation of a policy of insurance for non-compliance with the condition quoted above is well settled. The elementary writers are in accord upon it, and the point has been several times adjudicated by this court. 1 Phill. Insurance, 420. Walton v. La. Ins. Co., 2 Rob. 563. Battaille vs. Merch. Ins. Co. 3 Rob. 384. Leavitt v. West. Ins. Co. 7 Rob. 351.

It was attempted to be proved that the plaintiff did not know of this provision in the policy, but he ought to have known it. He had the opportunity to know it. The clause is printed like other parts of the policy, and his negligence in not reading it is the only cause of his ignorance of its stringent provision. He agreed on his part to comply with that stipulation as fully as he agreed to pay the premium, and is now barred from recovery for failure to do so. When he calls upon a court to compel the company to fulfill its part of the obligation, he must show that he has fulfilled all the conditions into which he entered.

The plaintiff insists that the rule of vitiation of policy for want of notice of other insurance does not apply here, because he had brought suit against the Lafayette company without success (for misdescription of policy), and as that contract cannot be enforced, it should not constitute a breach of the one he is now trying to enforce. But the clause of the policy set up against him is, not that if he should attempt to make an enforceable contract with other insurance companies and should fail in doing so, that his contract with the defendant should be at an end, but it forbade him to insure elsewhere absolutely without giving notice, and obtaining consent.

He also urges that there were two separate risks, one on the furniture in the corner store, and the other on that in the warehouse, and his insurance in the Lafayette company was on one only of these, and can

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 Allen vs. the Merchants' Mutual Insurance Company.
 

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not therefore affect the other. There was but one policy issued by the defendant, and the stipulation covering subsequent insurance applied to the property as a whole, and that was that the insurance then effected should not be good if the plaintiff afterward effected any other "on the property hereby insured."

We are not disposed to think the plaintiff has acted fraudulently. His insured stock is proved to have been worth much more than the amount of his insurance. Like Leavitt's case in 7 Rob. it is one of hardship, but the plaintiff can only blame himself that he did not inform himself fully of all the conditions of the policy. The clause in question is one of the most usual conditions of insurance policies, or rather it is inserted in all of them.

There is error in the judgment of the lower court, and therefore it is ordered, adjudged, and decreed that that judgment is avoided, and reversed, and that there be now judgment in favor of the defendant against the plaintiff upon his demand, and for costs.

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 No. 7116.

#### JOHN BLASINI ET AL. VS. SUCCESSION OF SILVESTRE BLASINI.

A suit by forced heirs against those in possession of the property of the succession, claiming to be owners under an executed will, instituted to annul the whole or part of the will, is properly brought in the probate court in which the will was admitted to probate and executed.

Where a man introduces a woman to his friends as his wife, calls her his wife, and he and she live together publicly as man and wife until her death, and their children, born while they are thus living together, are baptized, reared and educated as their legal offspring, the law will presume that they had been lawfully married, and that their children are legitimate, until it is shown that no marriage between them ever took place, or that it was void on account of some nullity established by law.

**A** PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

*Labatt & Clinton and Jules Buisson* for plaintiffs and appellees.

*Paul E. Théard* for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Silvestre Blasini died at his domicile, in New Orleans, in July, 1876. A few days after his widow, Emilie Charlotte de Tily, caused to be probated his will, made in 1859, by which she was appointed executrix, with usufruct for life, or during widowhood, of the entire property of the succession; and her son, Silvestre Blasini, Jr., sole issue of the marriage, was constituted universal legatee.

By judgment of the twenty-fourth July, 1876, Widow Blasini was

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Blasini et al. vs. Succession of Blasini.

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decreed to be entitled, in absolute ownership, as survivor of the community, to one half the property of the succession, and to the usufruct of the other half; and her son, Silvestre, was recognized as sole heir and owner of the other half, subject to the usufruct of his mother. They were sent into possession, under their respective claims and titles; and the succession was thus closed.

In September, 1876, this suit was brought by John Blasini, Joseph Blasini, and Loretto Blasini, claiming to be forced heirs of Silvestre Blasini, issue of his marriage with Isabella Barera, his first wife, who died in 1849. They demanded the nullity of the will, so far as it deprived them of their *légitime*; and they caused the Widow Blasini and her son Silvestre to be cited as defendants.

Defendants answered by general denial; and they specially denied that plaintiffs were legitimate children of Silvestre Blasini.

On the first trial the demand of the plaintiffs was rejected; but a new trial was granted; and the district judge, after an exhaustive review of the testimony, concluded in favor of plaintiffs, awarding to them, each, one fourth of the succession. There was again a motion for new trial; whereupon plaintiffs filed a *remittitur*, restricting the judgment in their favor to one fourth each, after deducting the one third which the testator was legally entitled to dispose of to their prejudice. Considering this *remittitur*, which corrected the manifest error of the judge, the new trial was refused; and the defendants appealed.

In this court appellants have filed a peremptory exception that, as the succession was closed by the judgment of twenty-fourth July, 1876, sending the widow and testamentary heir into possession, no suit could afterward be brought against the succession. If the suit had been brought against the widow alone, in her capacity as executrix, it could not have been maintained; but it was brought against the persons in possession claiming to be owners under the executed will. It was brought by the proper parties against the proper parties, and in the proper court. A suit by forced heirs for recognition and to annul, in whole or in part, a testamentary disposition, is of probate jurisdiction; and it falls within the cognizance of the court in which the will has been admitted to probate and has been executed.

There were several bills of exception taken, touching which it suffices to say that the objections went to the effect; and that all the testimony offered and received was pertinent to the only issue in the cause, the legitimacy of the plaintiffs.

An immense mass of testimony was taken on the trial, which it is not necessary to discuss separately and in detail. We shall state the material facts, as we consider them proven, and our views of the law applicable to them.

Silvestre Blasini, a Corsican by birth, in early life a sailor, came to New Orleans in 1833, or 1834, when he was about twenty-five years of age. He pursued different avocations; and made one or more voyages to Mexico and the islands of the Gulf; but he finally established himself permanently in business as the keeper of an oyster saloon and coffee-house.

About 1835 he was living with a very young woman, a Mexican, of dark complexion, whom he introduced to his friends and acquaintances as his wife, whom he said he had married in Mexico, whose name was Isabella Barera; and he continued to live with her publicly, introducing her as his wife, calling her his wife, until she died.

There were six children, issue of this connection, the first born in 1836, the last in 1848. Three of them died before their mother, and the survivors are the plaintiffs in this suit.

These children were reared in the house of their father and mother; and they were treated, cared for, and educated in all respects as their legitimate offspring. They were sent to schools of the highest respectability; they associated and played with children of their own age, of respectable parentage, living in the same vicinity, without any question as to their legitimacy; and the father caused a marble slab, with inscriptions, to be placed over the vault in which were buried two daughters, one born in 1836 the other in 1838, of whom the latter died in March, 1849, about two months before their mother. It will hereafter appear why the inscriptions on this slab were not produced in evidence.

On one occasion Blasini gave a dinner at his own house, on the anniversary of his marriage; and when he and the guests, probably, had drank too freely, he resented some supposed or real indignity to his wife by a violent blow, for which he was arrested.

On another occasion, when one of the witnesses, a woman, asked him where he got that "pretty little Mexican," as the phonographer reports it, or "mulattress," as one of the counsel, or "maitresse," as the other counsel understood the witness, Blasini answered promptly: "You are mistaken; that is my wife." "What church were you married in?" "In Mexico," he said. She immediately apologized; and he said it was all right; but that she was his wife. This witness went to Blasini, as she says, merely to gossip. It is evident that the dark complexion of Isabella had impressed the witness with the idea that she was colored, and, therefore, could not be the wife of Blasini; and licensed her, as she supposed, to speak thus slightly of her. The "pretty little Mexican," with whom the witness was not then acquainted, was in sight, but not within hearing. Blasini afterward introduced her to witness as his wife; and when witness told her, as a joke, what had passed between herself and Blasini, she told witness she was married.

On one occasion when one of the friends of Blasini censured him, out of the presence of Isabella, for his ill-conduct to his wife, he says Blasini told him she was not his wife.

On another occasion, a colored woman, who is rich enough to live off the earnings of the past, who did not hesitate to say that she was a concubine, and had been living in that condition for thirty-five years, testifies that she went to Blasini's, as she was in the habit of doing, to buy fish or oysters. She says she found Isabella in a corner of the room, crying, as she told witness, because of the ill-treatment of Blasini. Witness asked why she allowed him to treat her in that way; and she said, "because he has got the upper hand of me. I am not married to him, and that is the reason he treats me so." She thinks this was about 1848; and she says, on cross-examination: "I did not talk to her before that, or after that, about any thing."

On another occasion, as one of the female witnesses says, Blasini visited witness and her husband, at their home, and introduced witness and her husband to Isabella as his wife. She and Isabella immediately entered into conversation, sitting on a sofa, apart from the men; and she heard Blasini say to her husband, he was living with Isabella and having children by her, but that he was not married to her. Why not? Because it is a delicate thing; but she is colored, and I can't marry her. Subsequently, Blasini came and told her husband Isabella was sick; and her husband, at the request of Blasini, sent her to see Isabella. Witness found her in bed, and in tears. In answer to her inquiry as to what was the matter, Isabella said: "I am grieved to think I am not married with Mr. Silvestre." Witness went no more, and never saw Isabella again, because it was not an honest house!

The whole story is very improbable. The first time witness saw Isabella was when she and Blasini made a friendly visit, and Blasini, presenting Isabella to herself and her husband, said: "I introduce you my wife;" and soon after she heard him telling her husband he was not married to her because she was colored, which, if it had been true, would have made their marriage legally impossible, and the visit an insult. After that, neither witness nor her husband had any thing to learn as to the social relations of Blasini and Isabella. The second and last time she saw Isabella was when her husband sent her, at the request of Blasini, to visit, according to her, his colored concubine, whom she found in bed, sick with grief because she was not married to the man with whom she was living, who made friendly visits with her, who introduced her as his wife; and by whom she had three children living. Her husband did not want her to visit Isabella again, because it was not an honest house, which, if it had been the fact, she and her husband knew just as well from the beginning of their acquaintance with Isabella as they could

have known it afterward. The statement which she says Isabella made to her was precisely what her womanly, motherly instincts would have prompted her to keep as a sacred secret. Certainly she would not have been so ready to reveal to a stranger a fact which caused her so much distress and suffering, which would have made her an avowed concubine, and would have marked her children visibly with the ineffaceable stain of bastardy. This witness is the only one who pretends that Blasini ever said that Isabella was a colored woman; and the evidence proves conclusively that she was of Spanish origin, speaking Spanish as her mother tongue.

The story of the old colored concubine is equally improbable. She represents Isabella, with whom she never talked about any thing before or after that time, as unnecessarily and extraordinarily communicative; and she makes her assign as a reason for submitting to Blasini's ill-treatment, and for continuing to live with him, what would have been the very best reason for leaving him; and would have enabled her to break off at any time a burdensome connection, which marriage alone would have made obligatory and permanent.

No greater importance is due to the statement said to have been made by Blasini to his friend who censured him for his conduct to his wife. Under the influence of passion, or to excuse himself, or to escape further censure, Blasini might have said he was not married; but such a statement could not be permitted to belie the entire history of his public cohabitation.

On other occasions, as early as 1836, at different times, under different circumstances, to his best and most intimate friends, Blasini introduced Isabella as his wife; and he told them he had married her in Mexico. She bore his name, was called M<sup>me</sup> Silvestre and M<sup>me</sup> Blasini; and in conversation with others he called her his good wife, his angel. When she died he said to his best friend, Bofill, now dead, who superintended the funeral arrangements: "Tu iras enrégistrer la mort de ma femme." This was said in the hearing of a witness who gives his exact words, and who saw Bofill leave to do this service. In the proper book, in the office of the Recorder of Births and Deaths, under date June 10, 1849, upon the declaration of Bofill to the Recorder, in the presence of two subscribing witnesses, her death was registered as having occurred on that day; and it is also stated that she was a native of Mexico, aged twenty-eight years, and that she was married to Silvestre Blasini, "her surviving consort." The use of the pronoun "tu" by Blasini in his instructions to Bofill proves the intimacy of their relations, which is otherwise abundantly established; and he must have learned from Blasini the particulars embodied in the mortuary registry.

On the twenty-second September, 1849, about three months after the

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Blasini et al. vs. Succession of Blasini.

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death of Isabella, Blasini married Emilie Charlotte de Tily. When asked why he had married again, he said he wanted somebody to take care of his children. They were the three plaintiffs in this suit, the eldest ten, the next four years of age, the youngest about eighteen months old. These children were presented to the newly-married wife by her husband, their father, as his children. They continued to be members of his household; and they were cared for and treated with uniform kindness by their stepmother, as one of them acknowledges and testifies. When Silvestre, Jr., sole issue of this marriage, was baptized, John, the oldest son of the first bed, was his godfather; and it may be added, though out of the chronological order, that when Charles Louis, son of John Blasini, was baptized, in October, 1873, Silvestre, Jr., was his godfather.

From the records of the church copies were produced, showing that John was baptized on the fifteenth July, 1839, as the son of Silvestre Blasini and Elizabeth Barera; and that Joseph Marie was baptized on the thirtieth June, 1842. This record is remarkable, because it must be presumed that the officiating priest learns from the father and the mother the particulars which he embodies in the registry of baptism:

"Le 30 Juin, 1842, a été baptisé Joseph Marie Blasini, né le quatre Juin, 1842, enfant légitime de Sylvestre Blasini et Da. Isabella Barera, son épouse."

Why did the priest, writing in the French language, prefix to the name of the mother the title appropriate to a Spanish or Italian wife? How dared he style the child presented for baptism "enfant légitime," upon any other hypothesis than that he received from the parents, at the time he performed the ceremony, the particulars of which he made permanent record?

Equally remarkable is the registry of the death of Rosa, in which she is described as the legitimate daughter of Mr. Sylvestre Blasini and of Mrs. Blasini. True, this registry was made upon the declaration of Déjoux, a near neighbor of Blasini; but it is not to be presumed that he would officiously, without the request, or at least the knowledge and consent of the parents, have taken the trouble and incurred the expense of having this registry made, which could by no possibility have benefited him.

If these records serve no other purpose, they show beyond controversy that the parents of these children were publicly reputed to be husband and wife; that they publicly assumed to be husband and wife in the most solemn acts of social life; and that, with their knowledge and consent, their offspring were publicly reputed to be their legitimate children.

There were two daughters, Félicité Carmen, or Carmélite, as the

witnesses call her, and Apolina Rose, or Rosa, as she was called, the first born in 1836, the last in 1838. There is no proof fixing the period of the death of Carmélite; but the proof is abundant that Rosa died but a short time before her mother, in the same year. They were both buried in the same vault, belonging to their father, in which he was afterward buried. Several years after the death of Rosa, the testimony is some time before the war, Blasini employed a marble-cutter to place a slab on the vault, with inscriptions prepared according to his instructions. Within a short time, probably less than a month after the death of Blasini, the same cutter called on Widow Blasini to contract for putting a new slab on the vault. The widow, Silvestre, Jr., and his wife were present at this interview, and there was some conversation as to what should be done with the old slab, commemorative of the two girls. The cutter suggested that it might be broken, and used about the new work. It was finally agreed that this should be done; and now nothing remains to show what these inscriptions were, which testified to the father's love for the first fruits of his cohabitation with their mother.

A memorandum-book, which seems to have been used by Blasini, for his private affairs, was introduced in evidence, and comes up in original. The earliest date seems to be 1863; and the entries are not in chronological order. It is written for the most part in Italian, though there are entries in English and in French by different hands. Some of the writing was done by Silvestre, Jr.; and all that is in Italian does not seem to be by the same hand, though the greater part is. Most of the writing relates to business matters. One on the last leaf, purporting to be by Blasini, dated fourth March, 1863, states that Loretto, whom the writer calls "Il mio ragazzino," my boy, commenced work on that day for Bernard. About thirty pages from the end, after an entry of July 11, 1868, is a memorandum that "Il mio figlio Silvestre" had engaged to work by the month, beginning on the second November, 1873. On the reverse of the front back of the book is a memorandum that "Il mio figlio Loret" arrived from Brazil on the sixth January, 1873; and at the foot of the same page it is related that Joseph commenced work by the month, beginning on the seventh October, 1868. About forty pages from the beginning, immediately following an entry of June 2, 1868, is a memorandum that John arrived from New York, with his wife, on the fifteenth August, 1873, and that they left for Galveston on the twenty-eighth of the same month. The proof shows that they spent the intervening fortnight at the house of Blasini, where they were received and treated as members of the family. About a dozen pages further on, following entries of October and November, 1869, on the same page, it is stated that Loretto left for New York, by steamer, on the seventeenth May, 1873.

Insignificant as these entries might otherwise be, they afford important and unmistakable evidence of the affectionate fatherly interest which Blasini continued to take in these his children, and of his continued, avowed recognition of them as his sons, for more than twenty years after the death of their mother.

After an entry of August, 1869, near the middle of the book, are several blank pages, followed by a business memorandum of fifth January, 1867, or 1869, the last figure is not distinct. Then follows, on three consecutive pages, a statement, in Italian, said to be in the handwriting of Blasini, which purports to be the pedigree of all his children, beginning with the first, a daughter born in 1836, and ending with Silvestre, born in 1852. The writing immediately following this is dated second September, 1869. It is in different ink; and it affords no clue to the date of the pedigree. The uniformity of the writing indicates that it was all done at one sitting; and the freshness and color of the ink show that it is of recent date.

This statement is divided into as many paragraphs as there were children. Each separate paragraph relates to one child; and each purports to be signed by Silvestre Blasini, except the third and fifth. The statement is minute. It gives the day of the month and the year of the birth, the name of the mother, the name of the child, the name of Silvestre Blasini as the father, his birthplace, the names of his father and mother, the nativity of the mother described to be "del isola di Mesicho;" and the names of the godfathers and godmothers of all except Rose, stated to have died the day after her birth, and Silvestre. It mentions the date of the baptism of one, and the church at which another one was baptized. It applies the words "figlia di me Silvestre Blasini i di Isabell Barera" to the daughter Rose; and the words "figlio di me Silvestre Blasini i sua matre Isabell Barera" to each one of her sons; and it adds the surname Blasini to the baptismal names of two of them.

The statement with respect to Silvestre is equally minute, except that no mention is made of his baptism. Perhaps the omission was accidental; perhaps the writer did not care to say that John Blasini was the godfather. It uses the words legitimate three times: once with respect to the mother, styled "mia sposa legittima": once with respect to the son, styled "figlio legittimo di me;" and once with respect to the father, "patre legittimo del mio figlio."

It is manifest that this writing was not contemporaneous with the events to which it relates; and that the writer's memory was at fault in several particulars. Rose, the second child, is stated to have died on the twenty-fourth July, 1838. Independently of the official registry of her death, the proof is ample that she died in 1849. The date of the baptism of John is stated to be the eighth of July, 1839; whereas, the

records of the church show that he was baptized on the fifteenth July.

There were two boys, named Joseph, or Gioseppe, one Gioseppe Maria, born fourth June, 1842, died fourth July, 1842. After minute details of his birth, parentage, and death, the words "figlio naturale" have been written between the date of the death and the signature, on the same line. These words seem to have been an afterthought. They evidently occurred to the mind of the writer after the paragraph was completed, apparently after the signature was written. If they had expressed the truth, their proper place would have been in the body of the paragraph, where the words "figlio di me" are written. This same Joseph Maria is styled in the registry of baptism, in the archives of the church, "enfant légitime de Sylvestre Blasini et de Da. Isabella Barera, son épouse." This registry is contemporaneous history; and it can not be destroyed by the application to this child, more than twenty years after his death, of the words "figlio naturale." It is strange that the writer selected this dead child of the six children of the same bed, and applied these words to him alone. It is equally remarkable that these words should have been falsified in advance by the registry of his baptism, on the thirtieth June, 1842, five days before his death.

With respect to Loretto, the last child of the first bed, born in 1848, the writer could not recall the date of his birth: so, at the head of the paragraph relating to him he gives the date "alli 13, o 18, o 20 del Mese di Genaro." That is, when he was writing this paragraph he did not know whether this child was born on the thirteenth, or the eighteenth, or the twentieth of the month. Was it the father of the child who was thus forgetful? Would the father have set down deliberately, with the honest intention of writing a true and faithful pedigree of his children, without first having assured himself of all the particulars, and refreshing his memory when he found it defective?

The evidence shows that John Blasini was a wild boy; and as he approached manhood he gave his father great trouble, caused him much expense, and incurred his serious displeasure. About this time, influenced by his partiality for Silvestre, and to some extent by his feelings toward John and his brothers, all of whom he characterized as bad boys, according to the witnesses, Blasini determined to dispose of his entire property to their exclusion. Accordingly, in 1859, he made his last and only will, in which there is no reference to a former marriage, nor to any offspring except Silvestre, whom he describes, not as his only child, but as the only child of his marriage with Emilie Charlotte de Tily. The language of the will is: "Je suis marié à dame Emilie Charlotte de Tily, et n'ai qu'un enfant de mon dit mariage, nommé Sylvestre Blasini."

He did not, at any time, inform the children of Isabella that there



was any question of their legitimacy; but he did tell Dr. Lemonnier, and other respectable persons, after the birth of Silvestre, that he had not married Isabella, and that his children by her were illegitimate. He knew that his will could not be maintained if his children by her were held to be legitimate; and his disparaging and unnatural statements, perhaps the use of the words "*figlio naturale*" in his memorandum-book, with respect to the dead child, and the superabundant use of the word legitimate in the pedigree of Silvestre, may be attributable to the settled determination to have the will maintained for the benefit of Silvestre, on whom his father relied, as he told one of the witnesses, to support the honor of his name and family.

By our law, marriage is a civil contract. The most important of all contracts, it is meet, it is decent, that it should be celebrated with such publicity and with such solemnities as would leave no defect of proof that the parties were able to contract, that they were willing to contract, that they actually did contract. The presence of the civil magistrate or the minister of religion, and of kindred and friends, is eminently proper; and the license gives assurance of the absence of all legal obstacles. But the law does not require written evidence of the marriage, nor the testimony of those who were present and witnessed the ceremony; nor does it avoid the contract for want of a license.

In many cases it would be a cruelty to require positive proof of actual marriage. Especially would this be unreasonable and oppressive where, as in this case, the reputed marriage is said to have taken place in a foreign land: where both the parties are dead; and where their offspring, about whose actual filiation and descent there never was the vestige of a doubt, do not know in what part of that foreign land the marriage may have been solemnized.

The law will not tolerate the presumption that a man and a woman who live together, publicly, as husband and wife, are really living in concubinage in violation of the law and of public decency. From certain established facts certain legal presumptions are deduced; and where it is proven, as in this case, that the parties from the time of their first appearing together in the community in which they made their permanent domicile, publicly cohabited, assuming to be husband and wife, without separation or interruption until death intervened: that the woman bore the man's name, and he called her his wife, and introduced her as his wife, and declared that he had married her in the land of her birth: where they present their offspring to the world as their children, give them the surname of the father, have them baptized as their children, and rear, and care for, and educate them as such, the law accords to the man and the woman and to their children a legal and social status, based upon the presumption of marriage, the consequence of which is

the presumption of legitimate filiation and descent, which imposes on those who assert the contrary the burden of destroying that presumption. It is not going too far to say that the entire conduct of Blasini and Isabella created, in favor of their children, a presumption of legitimate descent, which could be destroyed only by proof that they were not actually married, or that there was some legal impediment by reason of which their marriage was legally impossible.

This presumption does not sanction voluntary cohabitation, nor elevate concubinage, of whatever duration, to the dignity of marriage. When it is said that marriage may be proven by reputation, the meaning is that the acts and conduct of the parties, as established by satisfactory proof, authorize and create the presumption that they were actually married, with all the formalities required to constitute a valid marriage by the law of the place at which it is reputed to have been solemnized : and this presumption is such that it yields only to proof that there was no such marriage, or that it was void because of some nullity established by law.

If a man or woman so circumstanced, to gratify some whim or caprice, or to accomplish some settled purpose, should deny the reputed marriage, a moral estoppel would intervene, and forbid the falsifying of their acts and conduct by such denial.

During the entire cohabitation of Blasini and Isabella they were apparently living in the observance of the obligations of the contract of marriage; and their acts and conduct are not compatible with any other theory than that they were actually married, in Mexico, before Isabella came to New Orleans. We must, therefore, regard the plaintiffs as their legitimate children, and forced heirs of their father, Silvestre Blasini. As such, they are entitled to participate equally with their paternal brother, Silvestre Blasini, Jr., in that portion of the succession of their father, the two thirds, which he was forbidden by law to dispose of by will to their prejudice.

That part of the judgment of the district court which awarded to Widow Blasini the one half is not before us for review. Upon the hypothesis that it is correct, the other half constitutes the succession of Silvestre Blasini. Whatever the succession of Silvestre Blasini may be, Silvestre Blasini, Jr., is entitled to one third of it, under and subject to the conditions of the will. The remaining two thirds will be divided equally between the three plaintiffs and Silvestre, giving to each one fourth of these two thirds. This is the extent and effect of the judgment of the district court, as restricted by the *remittitur* and the judgment refusing a new trial, and no amendment is necessary.

The judgment appealed from is therefore affirmed with costs.

Rehearing refused.

No. 7216.

## PHILIP WERLEIN VS. MERCHANTS' MUTUAL INSURANCE COMPANY.

Where the value of a certain piece of property, specifically insured for that value, is less than \$500, this court is without jurisdiction of a suit to recover the value, even though the property was insured under a general policy which embraced other objects aggregating in value much more than \$500.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*Merrick, Race & Foster* for plaintiff and appellee.

*A. & W. Voorhies* for defendant and appellant.

The opinion of the court was delivered by

MARR, J. Philip Werlein brought suit against M. E. Wheyland to recover \$345, with interest, being balance due for a piano; and by sequestration and attachment and garnishment, he caused to be seized, in the hands of the Merchants' Mutual Insurance Company "the insurance money of a certain piano upon which plaintiff had a vendor's lien and privilege amounting to \$345, interest, etc.," which piano, it was alleged, was insured by the company for \$400, and was lost by fire.

The company in answer to interrogatories denied indebtedness to the defendant; and exhibited a policy in her name, on household furniture, for \$1800; on a piano for \$400; on a sewing-machine for \$50; and on two mirrors for \$75 each, in all \$2400.

The suit resulted in a judgment in favor of plaintiff for \$345, with legal interest from seventh July, 1874, till paid, and costs of suit, with privilege on the property attached and sequestered. The plaintiff then took a rule on the garnishee, the Merchants' Mutual Insurance Company, to show cause why the \$400, amount of insurance money on the piano, should not be deposited in court, and judgment rendered against the company as garnishees for the amount of the debt, interest, and costs. The district judge decided that the rule to show cause was not the proper proceeding to determine the liability of a garnishee whose answers deny liability; and he dismissed the rule, reserving to plaintiff the right to proceed otherwise, and according to law, against the company.

Thereupon this suit was brought by Werlein against the Merchants' Mutual Insurance Company to recover the amount of the judgment in his favor against Wheyland. From the judgment in favor of plaintiff the company appealed; and plaintiff, appellee, now moves to dismiss the appeal for want of jurisdiction, because the amount in dispute is less than \$500.

There is no question here about the correctness and finality of the judgment against Wheyland; nor is there any dispute as to the fact

that the amount of the judgment against the company, including interest and costs, is less than \$500; but the company, appellant, maintains that the contract of insurance is indivisible, for the whole amount, \$2400; and that the matter in dispute is the liability of the company on this entire contract.

The evidence does not support this theory. Under this policy there was separate insurance on household furniture, not otherwise designated; on the piano, on the sewing-machine, and on the mirrors, at separate valuations, the whole aggregating the amount insured, \$2400. Now, all the household furniture might have been saved, and the piano and other articles might have been lost: or all might have been saved except the piano. So far as Werlein is concerned, he had seized in the original suit, by attachment and sequestration, nothing more, nothing less, than the insurance money on the piano, valued at \$400; and the judgment gave him a privilege on nothing more, nothing less, than the \$400 insurance money on the piano.

The basis of the present suit is the liability of the company, by reason of the judgment in the original suit, with privilege on the \$400 insurance money on the piano; and although it may be true that the same causes which would make the company liable for the loss of the piano would make it liable for the loss of all the other property covered by the policy, Werlein had nothing to do with the liability of the company for any thing more, nor for any thing less, than the \$400 insured on the piano specifically.

In defending this suit, the company might have alleged causes which would have exonerated it from liability for any loss whatever under the policy; but there could have been no judgment in this suit which would have been conclusive in favor of the company or against the company upon any other question or issue than liability for the loss of the piano. If the district court had determined that the company was not liable, for any cause, for the loss of the piano, that judgment would have been *res adjudicata* against Werlein: but it would not have concluded the assured, if she had brought suit on the policy to recover for the loss of the other property insured.

It frequently happens that the debtor, of whom his creditor claims a large amount, is garnisheed for a small part only of that amount: and that, if he is liable for the small amount seized in his hands, he would be liable for the whole amount claimed under the same contract or dealing; but this is no obstacle to the enforcement, by garnishment, of liability for the smaller amount; nor are any parties concluded by the judgment on the garnishment except the parties to the suit, to the extent of the demand.

The amount in dispute, so far as they are concerned, is the debt

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Werlein vs. Merchants' Mutual Insurance Company.

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which the seizing creditor seeks to enforce against the seized debtor ; and whether the appellate tribunal would have jurisdiction of the controversy is a question wholly dependent upon the amount which the garnishee could be compelled to pay upon the judgment.

It may be very inconvenient for the insurance company in this case, it may be inconvenient for garnishees in many cases, to litigate with different persons the question of liability for portions of a larger alleged indebtedness; but, after all, such inconvenience determines nothing with respect to the amount in dispute in any such case ; and the only criterion is: What amount would discharge the liability which the seizing creditor seeks to enforce against the garnishee? If the answer be, a sum exceeding \$500, that is the amount in dispute ; and appellate jurisdiction attaches ; if the answer be, a sum less than \$500, that is the amount in dispute ; and appellate jurisdiction does not attach.

The amount in dispute in this case is the sum of money which Philip Werlein demands of the Merchants' Mutual Insurance Company. That dispute is exclusively between Philip Werlein and the insurance company ; and as the amount demanded is confessedly less than \$500, this court is without jurisdiction.

The motion, therefore, must prevail ; and the appeal is dismissed with costs.

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No. 6823.

E. B. BENTON vs. T. C. MAHAN ET AL. CHISM & BOYD, INTERVENORS.

Money and goods advanced by a factor to a planter and used in paying the laborers who make the crop constitute privileged debts on the crop.

Disbursements made through the sheriffs by order of court, to gather, manufacture and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

*T. A. Bartlette* for plaintiff and appellant.

*Singleton & Browne* for intervenors and appellees.

The opinion of the court was delivered by

SPENCER, J. Thomas Ong having a lease of a sugar plantation in St. Bernard, applied to Chism & Boyd, commission merchants of New Orleans, for advances to enable him to make, gather, and manufacture his crop for year 1876. Chism & Boyd agreed to advance in money, goods, and necessary supplies for that purpose to amount of \$7700, including interest, commissions, etc. A formal contract was drawn and signed by the parties, in which Ong granted, in addition to the privilege existing by law, a special pawn and pledge on the crops, under the pro-

visions of act No. 66 of 1874. This act of pledge was passed April 27, 1876, and duly recorded. On 21st June, 1876, the sheriff under execution in Benton vs. Mahan, seized all the rights of Ong in and to said lease, growing crop, stock, implements, etc. At this time Chism & Boyd had advanced Ong nearly \$5000 in money, goods, etc.

Ong enjoined the sale under said writ, and Chism & Boyd continued to advance money, goods, and supplies for carrying on the place.

We find in the record an admission that Chism & Boyd's "disbursements made to Thos. Ong, the defendant in execution, for the purpose of making the crops, did, on the fourth of December, 1876, amount to the sum of.....\$14,082 04

That Chism & Boyd paid upon the order of the sheriff, expenses incurred in making the crop, the sum of..... 9,856 23

That the balance due Chism & Boyd on the rent claim transferred to them by the lessor of Thomas Ong, to whose liens and privileges they were subrogated, amounted to the sum of..... 3,441 55

That the costs of court amount to..... 416 55

\$27,796 37"

It seems that on twenty-third December, 1876, an order was rendered by the court directing and authorizing Chism & Boyd to make such advances to the sheriff as would enable him to take off the crop, and ordering the crop to be shipped to them for sale—proceeds to be held subject to further order of court. It is, as shown above, admitted that under this order they advanced \$9856 23. The crops were received and sold by Chism & Boyd, and realized \$20,894 63. The controversy before us is over the distribution of these proceeds.

Under the written admission of the parties above quoted, we see but little room for controversy.

It is admitted that Chism & Boyd up to fourth December advanced for the purpose of making the crop \$14,082 04. They had bound themselves to advance up to \$7700, and very naturally sought to save themselves by further advances. It is unnecessary for us to decide whether they have a privilege for the excess of their advances over \$7700. To that amount they were bound to advance, and to that amount they had beyond doubt a privilege under their contract. The evidence, aside from said admission, satisfies us that far more than \$7700 of their said advances were actually used in making the crop. It matters not under the act of 1874 whether the advances were in money, goods, or provisions. If the money and goods advanced be used in paying laborers who make the crop, they are privileged under the act of 1874, as much so as provisions consumed by them.

As regards the disbursements through the sheriff, by order of court, to gather, manufacture, and ship the crops, they are expenses incurred for the preservation of the thing seized.

The claim of the lessor is also a privilege, as are the court costs.

Stating the account therefore on the above basis, we have—

Amount advanced and expended under the contract of pledge	\$7,700 00
Amount disbursed by sheriff and paid by Chism & Boyd for gathering and making crops.....	9,856 23
Amount balance due lessor.....	3,441 55
Amount court costs.....	416 55

Making total of..... \$21,414 33  
due Chism & Boyd.

We have seen that the proceeds of the crops amounted only to \$20,894 63, a sum insufficient to pay the preferred claims of Chism & Boyd.

The judgment appealed from so decreed. It is correct, and is affirmed with costs.

Rehearing refused.

No. 6946.

PARISH OF PLAQUEMINES VS. JOHN BOWMAN.

30 1403  
51 1501

The police jury of a parish have authority to impose any license tax they may see fit to impose on trading boats trading within the parish.

**A** PPEAL from the Parish Court of Plaquemines. *O'Donnell, J.*

*R. T. Beauregard*, Parish Attorney, for plaintiff and appellee.

*A. B. Phillips* for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The only question presented to us is whether it is lawful and constitutional for the police jury of Plaquemines to lay and collect a license of \$300 from the defendant who is engaged in running a "trading-boat" therein. It appears that the State license therefor is only \$100. It is contended that the parish license can not exceed that sum.

Section 2743 R. S. provides that the police juries shall have power "to impose whatever parish tax they may see fit on all keepers of billiard-tables and grog-shops, and on all hawkers, peddlers, and trading boats."

We think it well settled that this provision is not in conflict with art. 118 of the constitution, which we have held does not prevent the Legislature from imposing different license taxes on different classes and occupations. *City vs. Kauffman*, 29 An. 283; *State vs. Rolle*, 30 An. 991.

Has said section been repealed or modified by subsequent legislation? The only provision restricting the police jury's power is found in act No. 17 of 1872, sec. 1, par. 91, and reads as follows:

"Nor shall the police jury of any parish levy a tax for any parish purposes, except to pay indebtedness incurred prior to the passage of this act, during any year, which shall exceed one hundred per centum of the State tax for that year, unless such excess, whether levied by village, city, or parochial authorities, shall first be sanctioned by a vote of the majority of the said voters of said village, city, or parish, at an election held for that purpose."

It is manifest, we think, that this act refers to the taxation of property, and not to the imposition of licenses on trades, occupations, and professions. But whether this be so or not, this general statute can not be held to repeal by implication the special and exceptional provision of sec. 2743 of the Revised Statutes, relative to keepers of "billiard-tables, grog-shops, peddlers, hawkers, and trading-boats." The Legislature of this State has for many years abandoned the government of this class of occupations to the discretion in great measure of the local municipal authorities. It has doubtless done so with a view to the better policing thereof, and in the interest of the good order of society.

Whether it is wise, expedient, and just to thus subject classes of occupations to local control, is a question for the legislative department, and one with which courts have nothing to do.

We think the judgment appealed from is correct, and it is affirmed with costs.

Rehearing refused.

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No. 5168.

CHARLES MADUEL, EXECUTOR, ET AL. VS. JULES TUYES ET AL.

An action of revendication of an immovable may be brought where the defendant resides, or where the property is situated.

A suit for the rents of the immovable involved in an action of revendication is properly brought where the property is situated.

A demand for the revendication of a certain property, and an alternative demand for its value, in case the defendants have incumbered it with obligations beyond its value, may be cumulated in the same suit.

**A** PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

*George L. Bright* for plaintiffs and appellants.

*Sambola & Ducros* for defendant and appellee, Fernandez.

The opinion of the court was delivered by

DEBLANC, J. This suit was brought, in the Fifth District Court for



the parish of Orleans, by the executor of J. M. Caballero's will, and by Mrs. Conte, the daughter of said deceased, to recover from defendants who all reside in this city, except J. A. Fernandez y Loneros, whose domicil is admitted to be in the parish of St. Bernard, an improved lot of ground situated within the limits of New Orleans, the apparent title to which stands in the name of y Loneros, and is assailed in this suit as a simulation concocted by him and two of the other defendants.

To this extent, plaintiffs' action is one in revendication and could—at their choice—have been brought either in the parish of Orleans or that of St. Bernard. This is indisputable.

C. P. 163.

Of the plaintiffs' moneyed demands, the first—that for rents—is, in substance, one for damages, which Mrs. Conte conceives that she has suffered, on account of y Loneros' alleged trespass on the real estate which she claims by inheritance from Caballero, and those damages are fixed at an amount which she and the executor presumed to be equal to the revenues which the property would have yielded since she has been deprived of its possession. That demand was properly brought before the judge of the place where the revendicated property is situated.

C. P. 165, No. 8.

As to those revenues, their action is but an incident to the main action; the action to recover the property, and its branch—that to recover its revenues, are nearly as closely linked and germane to one another, as a demand for the principal of a debt and the interest which has accrued on that principal. In this instance, the incidental demand is—not only not contrary to nor exclusive of the main one—but arises from the very act which produces the latter.

The last of plaintiff's demands—that for the value of the property, in case it be ascertained that defendants—taking advantage of their concocted simulation—have so encumbered the property that its recovery in kind would amount to its loss—is not inconsistent with the others. They ask the property itself, as they allege it was before the simulation, free of incumbrances—or its value, if defendants have burdened it with rights which may be enforced against it and exceed its value.

These different demands could be and were properly cumulated.

15 A. 293—C. P. 7-151—4 A. 28—6 R. R. 468.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from is annulled, avoided and reversed, and this case remanded to the lower court, to be proceeded with according to the views herein expressed and according to law: the costs of this appeal to be paid by defendants.



# INDEX.

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## ACCRETION.

SEE LEGACIES AND LEGATEES.

## ADMINISTRATORS.

The executor of a succession is liable in a fiduciary capacity for all succession funds received by him, or which come under his control; and he can not change the nature, or relax the stringency of his obligation for such funds, by wrongfully allowing them to be received by, or pass into the possession of a commercial firm, of which he is a member.

*Succession of Bayly, 75.*

In a suit for the partition of real estate owned in part by the heirs of a succession, the executor of the succession has no legal power to represent either the heirs or the succession.

*Boutté et al. vs. Executors of Boutté, 177.*

An administrator of a succession who receives from his predecessor in office a certain sum of succession money, which the former administrator had collected, and taken his full commission from, is not entitled to commission on said sum, merely because he divides the money among those to whom it belongs. Such a division does not amount to a new administration of the money.

A second administrator, whether he be a public administrator or not, is not entitled to a commission on any asset of the succession, even though he may have collected it, if the asset appeared in the inventory of, and paid a commission to the former administrator.

*Succession of François Bougère. On Opposition of Mrs. Amélie Richard, 422.*

One administrator of a succession is not estopped by mistaken admissions in the pleadings of a suit made by a preceding administrator.

*James Lusk vs. Succession of W. M. Benton, 686.*

The bond of an administrator inures to the benefit of the heirs, as well as of the creditors of the deceased.

*Goux vs. Moucla, 743.*

The executor of a foreign will is not permitted to exercise his office in Louisiana by virtue of his foreign appointment, but must first obtain the authority of the court here.

*Succession of Buller, 887.*

While administrators and executors must sustain the charges set forth in their accounts, the kind and degree of proof vary according to other facts which may be proved, or which appear on the face of the papers. There is a presumption in favor of the correctness of an executor's account whose general management evinces fidelity and integrity.

*Succession of Maria Bauman, 1138.*

**AGENCY.**

SEE PRINCIPAL AND AGENT.

**APPEAL.**

The real issue between the parties to a suit, which has been formally passed on by the lower court, will not be considered on a motion to dismiss the appeal. It must be referred for decision to the trial of the case on the merits.

The filing of the transcript of appeal in the Supreme Court, (in a case wherein a contest for office is involved,) nine days after the judgment in the case was signed by the lower court, is within the legal delay.

No acquiescence in the judgment of the lower court made by one of the appellants, or his attorney, can prejudice the right of appeal of another appellant, who was not a party to the act of acquiescence.

Any interested person may bring up the record of an appeal from the lower court, and deposit it in the hands of the clerk of the Supreme Court.

*State ex rel. Fred. Duffel, District Attorney pro tem., et al. vs. Morris Marks, 70.*

Where two separate appeals from two separate decrees are granted on the prayer of one petition, and the appeal bond only refers to one of the decrees, the appeal from the decree not referred to in the bond will be dismissed.

One who has been improperly made a party to an appeal is not qualified to ask that the appeal be dismissed.

One who was not a party to the suit in the court below, can not be made a party appellee to it.

The widow and heirs of a decedent have a right to intervene and appeal from a judgment affecting the possession or title to real estate belonging to the succession, even when the executors of the decedent are parties to the judgment, and have appealed from it.

A party to a partition suit who has taken a devolutive appeal from the judgment ordering the sale of the property to effect the partition, can not, after the property has been sold, suspensively appeal from a decree of court ordering the sheriff to put the purchaser of the property into possession of it.

When all the appellees are actually cited, it does not matter that the petition for appeal does not set forth the names of them all.

When the order for a devolutive appeal, and appeal bond are filed within a year from the date of the judgment appealed from, the appeal will be maintained, although it appears that the citations of appellees were not served until after the expiration of the year.

*Celina Boutt's, Wife, etc., et al. vs. Executors of François Boutté et al., 177.*

**APPEAL—Continued.**

An appeal will not lie from an order of court granting an injunction on condition that the applicant furnish such bond as the court shall thereafter designate, when the appeal is taken before the amount of the bond is fixed. Such an appeal is premature.

*The Jefferson & Lake Pontchartrain Railroad Company vs. the City of New Orleans, 211.*

An appeal will not lie from an order of court made in execution of a previous judgment of that court.

A party condemned for a less sum than five hundred dollars can not appeal to this court, although it may appear that the property of defendant, seized in execution of the judgment against him, is worth more than \$500.

*The State ex rel. T. S. Elder vs. the Judge of the Third District Court et al., 229.*

Where parties have been recognized by a formal decree of court as legatees of a succession, no appeal will lie from a subsequent judgment on a rule taken by them, or on the application of the executor, ordering him to sell property enough to pay the legacies.

*State ex rel. Alice McCloskey et al. vs. the Judge of the Third District Court, 233.*

When the judgment appealed from only involves a claim for damages of four hundred and fifty dollars, and the possession of property, the value of which possession is neither proved, nor alleged, this court is without jurisdiction.

*Mrs. J. B. Ducoing, Administratrix, vs. Joseph Billgery, 250.*

The bond for a suspensive appeal from a judgment which does not decree the payment of a certain sum of money, or the delivery of a movable, or immovable, need only be for an amount sufficient to pay costs.

The bond for a suspensive appeal from a judgment which orders the sheriff to put a party in possession of certain real estate, should be for a sum exceeding by one half the estimated value of the revenues of the property pending the appeal, and for whatever additional sum may seem necessary to cover injury or deterioration which may be caused to the property by the appellants during the time they may continue in possession.

*State ex rel. Durand et al. vs. the Parish Judge of St. Martin Parish, 282.*

A mandamus will issue to compel the judge of a lower court to grant an appeal from any interlocutory decree of the court which works an irreparable injury to the party praying for the appeal.

*State ex rel. Julia A. Ventriess vs. the Parish Judge of Iberville Parish, 207.*

**APPEAL—Continued.**

In a suspensive appeal from a judgment dissolving an injunction without damages, the amount of the appeal bond need only exceed by one half the costs, which the appellant was condemned by the judgment to pay.

*State ex rel. Williamson vs. Judge of the Fourteenth Judicial District, 314.*

The interlocutory decree of the lower court maintaining a provisional seizure may, on the general appeal of the case on the merits, be reviewed by this court.

*Aurich vs. Wolf & Levi, 375.*

In order that this court may have a record before it, in those cases where appeals from a justice's court are allowed, it is the duty of the justice whose judgment has been appealed from, to make to this court a certified statement of all the facts of the case, and every thing on file in the suit.

*State ex rel. Boutroue vs. Judge of the Third District Court, 415.*

Where it appears that the petition for an appeal from a decree of court rendered in chambers was filed in open court, on the same day, and immediately after the decree was rendered, and in the presence of the counsel of plaintiff and defendant, it will be held that the appellee was sufficiently cited.

*Brown vs. Brown, 506.*

Where the police jury of a parish join in an appeal from a judgment making peremptory a mandamus against the treasurer of the parish on account of alleged services rendered, and expenses incurred in behalf of the parish, no affidavit of interest is required of the police jury. The interest is patent on the face of the record.

*State ex rel. John J. Barrow, Sheriff, et al. vs. Charles L. Fisher, Treasurer, 514.*

The emancipation of a minor qualifies him to become a surety on an appeal bond.

*Silas H. Cooper and Wife vs. Jno. T. Rhodes, 533.*

In a contest between a judgment creditor and a garnishee, the fact that there is no note of evidence, assignment of error, or agreed statement of facts, will not justify a dismissal of the appeal, when the record contains the answers of the garnishee to the interrogatories served on him, the allegation of the creditor himself of the existence of the writ of *feri facias*, and other matters of proof, which though not specifically noted as evidence, yet taken together afford sufficient basis for an intelligent judgment.

*Edward Meyer vs. G. Deffarge. H. Mehnert, Garnishee, 548.*

The appellee has the right to require that the sureties on an appeal bond, who signed the bond jointly, shall all reside within the jurisdiction of the court whose judgment has been appealed from, when the respective sum for which each surety has bound himself must

**APPEAL—Continued.**

be computed, in order to make up the necessary amount of the bond.

*State ex rel. Zuntz & Sporn vs. the Judge of the Fifth District Court et al., 582.*

The transcript of an appeal from an order of seizure and sale need not contain any of the proceedings on the injunction taken out to arrest the seizure and sale, since such proceedings could not be considered by this court on such an appeal.

*Adam Dobel vs. J. M. Delavallade. E. P. Delavallade, Assignee, 604.*

Where in a contest between a seizing judgment creditor and a third opponent for the proceeds of the seized property, amounting to more than a thousand dollars, the latter claims the whole proceeds, and the former only four hundred and seventy-three dollars of it, no appeal will lie to this court; because the amount really in dispute is only \$473.

*Picard & Weil vs. J. J. Wade. S. B. Newman & Co., Third Opponents, 623.*

The plaintiff is entitled to a suspensive appeal from a judgment dissolving an injunction with damages, on giving a bond for a sum exceeding by one half the amount of the judgment for damages.

The surety on an injunction bond who has, in the decree dissolving the injunction, been condemned in damages *in solido* with his principal, can not be surety on the bond of the appeal from the decree.

*Louis Bauer vs. Lochte & Cordes and Sheriff, 685.*

Where a corporation entitled to certain exclusive privileges enjoins a defendant from further violating those privileges, alleging that defendant had already damaged them, by violating said privilege, to the extent of \$200, and making affidavit that the amount in dispute, and the right claimed by them was over \$500 exclusive of interest and cost, this court will have jurisdiction of an appeal taken in such a case.

*Crescent City Live-Stock and Slaughter-House Company vs. John Larrieux, 798.*

Where three separate questions, tending to one conclusion, arise in one and the same case, as for example in the settlement of a succession, and having been consolidated by consent of parties are passed on in three separate decrees, rendered simultaneously, these decrees may all be brought before this court in one single appeal.

In such a case one appeal bond is sufficient; and as appellants were not condemned by the lower court to pay any sum of money, or deliver any property, the bond need only be for an amount to cover costs.

Persons not parties to a suit have a right to appeal from the judgment

**APPEAL**—*Continued.*

rendered in it, if they intervene, and allege that they have been aggrieved by the judgment. And if it shall appear to this court that they have an interest in the suit, their appeal will be maintained.

*Succession of John Clark. Pamela Clark et al. Appellants. Mrs. Reilly et al. Appellees, 801.*

No amendment of the judgment below will be made in favor of the appellee which he has not specially asked for.

*Schwartz vs. Cronan, 993.*

Where, in consequence of an agreement between the attorneys of a succession, and of its opposing creditors, entered into to prevent the record of appeal from being too bulky, certain necessary papers have been accidentally omitted, a writ of *certiorari* will be allowed to supply them.

*Succession of R. H. Woods. On Opposition of Chubbuck et al., 1002.*

Where, in a partition suit, the act of the lower judge complained of was done on his own motion, and neither he, nor the parties interested in the partition, are before this court, the appeal will be dismissed.

*Ventress vs. Brown, 1012.*

When the plaintiff in injunction appeals, by motion in open court, from the judgment dissolving the injunction and condemning him and the surety on his bond in damages *in solido*, the surety thereby becomes a party, appellee, and hence is disqualified from becoming the plaintiff's surety on his appeal bond.

An appeal taken separately by one of two defendants who have been condemned *in solido*, will not prevent the other from taking an appeal at a subsequent time, within the legal delay.

As between appellees, the judgment of the lower court will not be disturbed.

*Sara T. Bowman vs. Kaufman, Sheriff, et al., 1021.*

A suspensive appeal in a case prevents, pending the appeal, any proceeding, contradictorily taken, for fixing the fees due to a curator *ad hoc*.

*State ex rel. Board of Trustees for the Blind vs. Judge of Sixth District Court, 1026.*

When the judgment of the lower court on an exception filed to the account of a syndic, is in effect the dismissal of his account, and a refusal to hear his proofs of its correctness, he is entitled on his averment that he can file no other account, to an appeal from the judgment.

*Succession of Oramel Hinckley. On Exception of Heirs, 1083.*



**APPEAL—Continued.**

When the face of the papers sufficiently present the issue involved in an appeal from a justice's court, no statement of facts need appear in the record.

*Parish of St. Martin ex rel. M. Baker, Road Overseer, vs. Pelletier Delahoussaye, 1092.*

When the signatures of the two sureties on an appeal bond appear at the bottom of the bond, and the name of one of them appears in the body of the bond, the bond is good and sufficient.

*Widow Briant vs. Désirée Hébert et al., 1127.*

The oath of an intervenor, going to show the nature and amount of his claim, is not admissible in evidence when filed for the first time in this court.

*Meche vs. Lalamie, 1136.*

An appeal will not lie to this court from the decree of an inferior court in a matter of *habeas corpus*.

The interest which entitles a party to appeal must be a real, existing interest in the particular cause, and not a conjectural one, contingent on the happening of an uncertain future event.

*State ex rel. Agusti vs. Houston, Sheriff, 1174.*

Where a wife alleges in her petition that she is authorized by her husband to bring suit, and no exception is taken in the lower court, the question of her authority will not be considered on appeal.

*John B. Durham vs. Heirs of John B. Daugherty et al., 1255.*

This court will not order the production of an original act, when it is not necessary to the decision of the case.

Where a defendant who has enjoined an order of seizure and sale appeals from the decree rendered in the injunction suit, he is not thereby estopped from also appealing from the order of seizure and sale, when it appears that the grounds set up in the injunction suit are not the same as those presented in the appeal from the order.

*John Frank Pargoud vs. Mrs. Sarah Richardson, 1286.*

Where in an application for a rehearing no time is asked in which to file a printed statement of the applicant's points and authorities, and none has been filed, the rehearing will be refused.

*Lafayette Fire Insurance Co. vs. Remmers, 1347.*

Where the value of a certain piece of property, specifically insured for that value, is less than \$500, this court is without jurisdiction of a suit to recover the value, even though the property was insured under a general policy which embraced other objects aggregating in value much more than \$500.

*Philip Werlein vs. Merchants' Mutual Insurance Co., 1399.*

**ATTACHMENT.**

A creditor's oath to the fact alone of the non-residence of his debtor, gives him the right to attach the latter's property. He need not swear that the debtor "can not be cited."

*DePoret vs. Gusman, 930.*

**ATTACHMENT—Continued.**

Where property wrongfully attached is lost while in the sheriff's keeping, the owner is entitled to recover its full value from the plaintiff in attachment, and his sureties. If no malice is shown in the plaintiff, the owner is only entitled to full reparation for the actual damage he has suffered.

*Teal vs. Lyons, 1140.*

**ATTORNEYS AT LAW.**

Where it appears that the services of an attorney in settling up the complicated affairs of a succession have been long continued, wisely directed, and valuable, this court will be guided as to the money value of his services (in the absence of special agreement as to his fees, and of specific evidence as to the extent of his services) by the opinion of the local bar to which he belongs.

*Succession of Jackson, 463.*

When parties silently acquiesce in and enjoy the benefits of a confession of judgment made in their names by an attorney at law, who has acted in the matter to their knowledge as their representative, they will be estopped from afterward denying the authority of the attorney to represent them.

*Maraist, Fournet & Co. vs. C. Caillier, Administratrix, 1087.*

**BACHELOR OF LAW.**

A mere resolution, passed by the Board of Administrators of the University of Louisiana, that the degree of bachelor of law shall be granted to a certain person, and directing the President of the University to confer said degree, and the usual diploma, followed by a refusal of the President to obey the direction, has not the character and authority of a diploma.

The degree of bachelor of law, conferred on a party by the Board of Administrators of the University of Louisiana, will not authorize him to demand of this court a license to practice law in this State, unless the diploma is signed by the President of the University, and the Professors of the Department in which the student has graduated.

*State ex rel. Duffel vs. Marks, 97.*

**BANKRUPT LAW.**

The amendment of the Bankrupt Act authorizing *compositions* to be made, was merely designed to provide another *mode* by which discharges in bankruptcy could be effected; but it was not intended to enlarge the scope of discharges, and thus enable the debtor to liberate himself from any class of obligations, which a discharge under the original bankrupt act would not free him from. Hence a composition, under the bankrupt act, will not release the debtor from any fiduciary debt.

*Succession of Bayly, 75.*

**BANKRUPT LAW—Continued.**

In determining what effect the discharge in bankruptcy of a principal debtor will have on the obligation of his surety, this court will be guided by the law of Louisiana and not by the bankrupt law.

*J. M. Serra é Hijo vs. Hoffman & Co.*, 67.

Parties who have made a composition under the bankrupt act with their creditors, retain the right to sue in their own names, for whatever may be due them.

*G. M. Bayly & Pond vs. Stacey & Poland*, 1210.

**BILLS AND PROMISSORY NOTES.**

One who has executed a promissory note in error, for a debt not due by her, may legally resist the payment of the note, so long as the note is not in the hands of an innocent third person, who has taken it for value before its maturity.

*Bridget Reardon vs. Daniel Moriarty et al.*, 120.

Where a draft is drawn in favor of the payee on a certain fund to arise from the sale of property then in the drawee's hands, and the payment of the draft, by its own terms, is postponed to the payment, (out of the same fund), of a debt due the drawee, the drawee, who has not accepted the draft, is only liable for whatever balance of the fund may remain, after the payment of his own debt.

*E. Marqueze & Co. vs. S. Fernandez & Co.*, 195.

Promissory notes given by a vendee for the price of a thing which the vendor assumed to sell, but which never had an existence, are utterly without consideration, and can not be enforced by the vendor or by any one who has acquired them after their maturity.

*Cummings vs. Saux*, 207.

In order to recover from the maker of a promissory note it is not necessary to make a demand at the place of payment designated in the note.

*Henry Renshaw vs. A. Keene Richards*, 398.

The signer of a promissory note which reads that "we promise in *solido*," etc., will be held bound as a solidary debtor on such note, unless he proves that he has been legally released from his obligation.

*Wm. H. Boullt vs. Jerome Sarpy et al.*, 494.

Before the maker of a lost, or mislaid negotiable note, which was transferred before its maturity, can be made to pay it, he is entitled to be indemnified against its subsequent appearance.

*Nalle & Cammack vs. Conrad*, 503.

The maker of a promissory note indorsed in blank, and acquired by the holder before its maturity, can not resist the payment of the note on the ground that the holder is not the real owner, unless he alleges and shows that he has good defenses, or claims, against the real owner.

**BILLS AND PROMISSORY NOTES—Continued.**

An agent in whose hands a note has been placed for collection, may sue on it in his own name.

*George M. Klein vs. Mrs. Buckner et al., 680.*

In the absence of any express or implied agreement, a party is not compelled to pay a draft drawn on him merely because he has been in the habit of paying similar drafts.

*Helm vs. Meyer, Weis & Co., 943.*

The makers of a promissory note can not annul a judgment obtained against them on said note by the administrator of a succession, on the ground that the note did not belong to the succession, or on the ground that the administrator was not qualified to act as such.

*Maraist vs. Guilbeau, 1087.*

One who executes a promissory note in the name of another without authority to do so, becomes personally liable for the amount of the note.

*Dodd, Brown & Co. vs. Bishop & Co., 1178.*

One who is publicly acting as the deputy of a notary, and whose oath of office has been administered by the notary himself, is qualified to make demand of payment and perform the other functions of a deputy notary.

*Buckley vs. Seymour, 1341.*

A promissory note which has for its consideration the discontinuance, by the holder of the note, of certain criminal proceedings instituted by him against a party for obtaining money under false pretenses, is void.

*U. Ozanne vs. Abraham Haber, 1384.*

Where in a contract of insurance which covers a storehouse, and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house, or the goods, in another company without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.

*Oscar Allen vs. the Merchants' Mutual Insurance Co., 1386.*

**BOARD OF LIQUIDATION.**

The Board of Liquidators appointed to carry into effect the provisions of the Funding Act of 1874, can not refuse to fund any legal warrants, or bonds of the State, when required to do so by the owners, or the legal custodians of such bonds.

*State ex rel. Board of Supervisors vs. Board of Liquidators, 816.*

The mere fact that certain valid State warrants paid to the State as the purchase price of State bonds that had been issued to the free-school fund, (and which the State had no power to sell,) are in the treasury of the State, and not in the hands of their owner, is not a ground for a refusal by the Board of Liquidation to fund them.

*The Louisiana National Bank vs. the Board of Liquidation, 1356.*

**BONDS.**

The judgment creditor and his debtor are incompetent to form a private agreement, or bond, which shall have the force and effect, and be clothed with the extraordinary characteristics of a "Twelve-months Bond." *Eliza L. Strother vs. T. P. Richardson, Sheriff, et al., 1269.*

**BONDS OF THE STATE.**

Bonds of the State which are described by the Supplemental Funding Act of 1875 as "questioned and doubtful," can not be legally funded by the Board of Liquidation until they have been scrutinized, and declared valid by this court.

Although such bonds be negotiable in form, and have passed into the hands of innocent third persons, who have purchased them in open market, before their maturity, and for a valuable consideration, they nevertheless will not be a valid debt of the State, unless their holders prove that they were issued in accordance with law. The rule of the commercial law in favor of the holders of ordinary negotiable paper, is not applicable to such bonds.

The bonds of the State issued in favor of the "Bœuf and Crocodile Navigation Company," were not issued in conformity to law, as obviously appeared from the Act authorizing their issue, printed on the reverse sides of the bonds; and therefore are not binding obligations of the State.

*Lord Cecil et al. vs. the Board of Liquidation, 34.*

In the absence of proof to the contrary, it must be assumed that in the issue, and negotiation of certain State bonds nearly twenty-five years ago, the Governor and Treasurer, who were charged with their issue and negotiation, fulfilled the trust confided to them in accordance with the terms of the law which authorized the issue of the bonds.

Where bonds of the State, payable to the order of a certain payee, and indorsed in blank by the payee, are offered and received in evidence without objection, the indorsements will be deemed sufficiently proved to establish in the holder, a legal title to the bonds.

Bonds of the State that appear to have been issued according to law, and to have had a lawful consideration, are valid obligations of the State entitled to be funded.

*H. W. Hamlin et al. vs. the Board of Liquidators. Isidore Newman, Intervenor, 443.*

The bonds issued by the State in 1828 in favor of the "Consolidated Association of Planters of Louisiana," are valid obligations of the State, and entitled to be exchanged for consolidated bonds of the State, under the funding act passed by the Legislature in 1874. On such bonds the State is bound as principal, not as surety, and hence is not entitled to the right of discussion.

**BONDS OF THE STATE—Continued.**

Bonds of the State, the exchange of which for consolidated bonds subrogates the State to rights against third persons, should not be destroyed by the Board of Liquidation, but turned over to the proper State authorities for the benefit of the State.

*Lesassier & Binder vs. the Board of Liquidation, 611.*

The Funding Act of the Legislature, approved January 24, 1874, contemplated in its purpose, and embraced in its provisions, only the actual debt of the State. It excluded the contingent liability of the State embodied in the bonds loaned to the Citizens' Bank, and the Consolidated Planters' Association.

*The State ex rel. New-Orleans Pacific Railway Company vs. F. T. Nicholls, Governor, et al., 980.*

As to the *bona fide* holders of the bonds issued by the State in the year 1828 in aid of the Consolidated Association of the Planters of Louisiana, the State is the principal and sole obligor on those bonds, and such bonds are entitled to be received by the Board of Liquidation in exchange for the new consolidated bonds of the State.

*Ed. J. Forstall & Sons vs. Board of Liquidation, the State Intervenor, 1151.*

Where by an act of the Legislature bonds of the State are authorized to be issued and loaned to a corporation, on condition that it shall pledge certain of its own mortgage bonds, payable forty years after their execution, to secure the State, the tender of bonds by the corporation, the payment of all of which is made exigible whenever there shall be a six-months default in the payment of the interest on any of said bonds, is not such a compliance with the law, as will authorize the corporation to demand the issue of the State bonds. The fact that the bonds of the corporation, tendered as a pledge, are dated before the passage of the law authorizing the loan, and that they are made payable, at the holder's option, at another place in addition to that prescribed in the act, is immaterial.

*State ex rel. New-Orleans Pacific Railroad Company vs. Francis T. Nicholls et al., 1217.*

**CERTIORARI.**

The writ of *certiorari*, issued by a superior to inferior court, lies not only in causes of which the superior court has appellate jurisdiction, but likewise in causes in which there is no appeal, and where the inferior court is of the last resort.

The only court authorized to issue a writ of *certiorari* to an inferior court, is the one to which all appeals from the inferior court are made returnable.

This court has not appellate jurisdiction of criminal cases before the Recorders' Courts of New Orleans, when the penalty imposed is not

**CERTIORARI**—*Continued.*

death, nor imprisonment at hard labor, nor a fine exceeding three hundred dollars, nor where a fine or penalty imposed by municipal corporation is not involved; and hence is without authority, in such cases, to issue writs of *certiorari* to the Recorders' Courts.

*The State ex rel. Herbert Geale vs. the Recorder of the First Recorder's Court of New Orleans, 450.*

**CHARGES TO JURIES.**

SEE JUDGES.

**CITIZENSHIP.**

SEE REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

**CITATION, AND WAIVER OF.**

SEE PRACTICE AND PLEADING.

**CITY OF NEW ORLEANS.**

In virtue of an act of the Legislature, passed March 17, 1870, no creditor of the city of New Orleans, whether he be the holder of a liquidated, or an unliquidated claim, can compel by mandamus, any auditing officer of the city to issue, or deliver to him, a warrant for any amount due him; or compel any disbursing officer of the city to pay him any sum which he may claim that the city owes him.

*State ex rel. Jacob Strauss vs. J. G. Brown, Administrator of Public Accounts, 78.*

The approval by the Clerk and Judge of the Criminal Court of the parish of Orleans, of the account of the Criminal Sheriff, for fees and expenses of his office, does not amount to a judicial decree in his favor for the amount of the account, nor conclude the city of New Orleans from contesting the account. And if the city should dispute the correctness of his bill, he must, like the holder of any other contested bill, sue and obtain judgment on it, before he can ask for a mandamus to compel its payment.

*State ex rel. James D. Houston vs. the City of New Orleans, 82.*

It is the duty of the Mayor and Administrators of the city of New Orleans to set apart, and provide specifically, in the forthcoming yearly budget, out of the funds to arise from the *general tax* therein levied, means for paying *all* judgments against the city then registered in the office of the Administrator of Public Accounts, and unsatisfied, in the order of their registry. And this duty, the Mayor and Administrators may be compelled, by mandamus, to perform.

It is not their duty to levy a separate tax to pay such judgments; nor is it made obligatory on them to pay such judgments out of the fund in their hands set apart for contingent expenses; although they may, in their discretion, discharge the judgments out of that fund.

If the means arising from the general tax levied in one annual budget

**CITY OF NEW ORLEANS—Continued.**

are not sufficient to pay all of the registered judgments, provision must be made in each subsequent budget, until all of such judgments are successively extinguished.

The fact that the term of office of the existing Mayor and Administrators of a city is nearly expired, is no ground for defeating, or delaying the legal proceedings of a creditor of the city who has a good cause of action.

*State ex rel. Carondelet Canal and Navigating Company vs. Mayor and Administrators of New Orleans*, 129.

The city of New Orleans is obliged to keep its streets, sidewalks, and bridges repaired, and if on account of its neglectful delay in making a needed repair a person suffers an injury, to which he has not contributed by any fault of his own, the city will be liable in damages for the injury.

*William O'Neill vs. the City of New Orleans*, 220.

When a party who is sued in virtue of a contract made by a municipal corporation, denies, in general terms, that the corporation has complied with the law authorizing it to make such a contract, the burden of proof is on him to show that the law has not been complied with. The presumption is that the corporation has acted legally.

When the work of constructing sidewalks on one of the streets in the city of New Orleans has been done under a contract made at the discretion of the Common Council, each owner of property fronting on such street can only be held for two thirds of the cost of the sidewalk in front of his property.

*Connell vs. Hill*, 251.

A judgment creditor of the city of New Orleans who has registered his judgment in accordance with law, is entitled to a mandamus to compel the auditing and disbursing officers of the city respectively to warrant for and pay the same, or so much thereof as there may be a special fund in the city treasury to pay such judgment; and no misapplication of such fund by any, or all of the officers of the corporation, can hinder or defeat the rights of the creditors entitled to be paid out of such fund.

*State ex rel. Carondelet Canal and Navigation Co. vs. Pilsbury, Mayor*, 705.

Under the present charter of the city of New Orleans the Common Council may lawfully assign to the Administrator of Commerce the superintendence, and management of the bridges across the navigable canals of said city.

*John McCaffrey, Administrator, vs. Charles Cavanac, Administrator*, 882.



**CITY OF NEW ORLEANS—Continued.**

Under the present charter of the city of New Orleans, the city may obtain the dissolution of an injunction against it, without furnishing the bond and security required of other litigants by article 307 of the Code of Practice.

*The Jefferson and Lake Pontchartrain Railway Company vs. the City of New Orleans, 970.*

The city of New Orleans is not entitled to a preference for license dues, unless its claim for the same has been registered.

*Cochran vs. Ocean Dry-Dock Company, 1365.*

The city of New Orleans can not be compelled to re-imburse the drainage taxes voluntarily paid to the Drainage Commissioners, and actually expended for drainage purposes.

*New-Orleans Canal and Banking Co. vs. City of New Orleans, 1371.*

**CLERKS OF COURT.**

A compact with his deputy made by a clerk of court, which stipulates that the deputy shall perform the duties of the office, and the clerk shall receive a proportion of the official fees, or a fixed monthly sum, is not such a transaction as will forfeit the clerk's right to his office, and thus create a vacancy in it.

*State ex rel. Lisso vs. Peck, 280.*

The clerk of the parish court in which a succession is being administered has authority to issue a *fi. fa.* for the seizure and sale of any property of the succession, previously sold on a twelve-months bond, and not paid for, without regard to its value.

*Cobb vs. Richardson, Sheriff, 1228.*

The clerk of the court is without authority to issue, and the sheriff to execute a writ of *fi. facias* to enforce, with a judicial decree, the provisions of a bond formed by private convention.

*Strother vs. Richardson, 1269.*

**COMMUNITY.**

The community formed by a man's second marriage can not be held liable for the value of property belonging to a former community, sold by him during his second marriage, unless it be proved that the proceeds of such property were expended for the benefit of the second community.

The debt due by a father to his children by a former marriage, for their half of the proceeds of the community property sold by him, is exigible against his succession, and its payment can not be defeated or delayed by any claim of usufruct made by the surviving widow of his second marriage.

*Succession of Jean C. Bollinger. Opposition of Paul and Mathieu Ballatin, 193.*

**COMMUNITY—Continued.**

All property found in the succession of a deceased husband, or wife, and in the possession of the surviving husband, or wife, is presumed by law to be community property, until the contrary be proved.

When separate funds of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband, or his succession, to the amount of such funds. But the evidence must establish with reasonable certainty, that the funds thus used were really the separate property of the husband; merely making that fact probable is not sufficient.

Money received by the executor of a deceased husband, arising from the liquidation of a former commercial firm of which the husband was a partner for several months after his marriage, can not be deducted from the community, until it is shown that such money was not a part of the husband's share of the profits earned by his firm during his marriage.

*Mrs. Ada Pierce Denègre vs. Mrs. Silvaine Denègre et al., Executors of John Denègre, 275.*

The fees due the lawyer for successfully defending a wife in a suit of her interdiction brought by her husband, are a debt for the community.

*Breaux, Fenner & Hall vs. Francke, 336.*

It will be presumed that the community of acquets and gains exists between the husband and wife until the contrary is shown.

*Jacob C. Van Wickle vs. O. H. Violet and Wife, 1106.*

**COMPENSATION.**

A debt due to a municipal corporation for taxes, can not be offset, or compensated, by any debt due by the corporation. Thus the tax due for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

*The City of New Orleans vs. John Davidson et al., 541.*

The taxes due a municipal corporation for one year, can not be compensated by an overpayment of taxes made by the debtor the year previous.

*City of New Orleans vs. J. Davidson and J. D. Hill et al., 554.*

**CONFISCATION SALES.**

The ownership acquired in virtue of a *confiscation* sale, under the act of Congress of 1862 amounted to a mere usufruct. It was and could be only imperfect, and was to terminate with the life of him against whose interests and property the confiscation proceedings were directed. There is wanting therefore in the title of one who purchased the property at a confiscation sale the quality of ownership necessary to enable him to prescribe.

**CONFISCATION SALES—Continued.**

The fact that the price paid by a purchaser of property at a confiscation sale was used to pay off a pre-existing mortgage on the property, does not entitle such purchaser to demand that he shall be refunded the price, when, at the expiration of his usufruct, the owners of the property call on him to restore it to them. Nor can he demand that he shall be re-imbursed what he has expended for repairs, and taxes on the property.

*Pendegast vs. Schawtz, 590.*

**CONSTITUTION.**

The constitution, like legislative acts, must, if possible, be construed in such a way as to render all of its provisions operative, rather than in a way that will make some of them nugatory.

*Decklar vs. Frankenberger, 410.*

The constitutional amendment limiting the debt of the State to fifteen millions of dollars only restrains the Legislature from increasing the actual, or present debt of the State beyond that sum. It does not inhibit any increase of the contingent liability of the State.

*State ex rel. New-Orleans Pacific Railway Co. vs. Nicholls, Governor, 980.*

**CONTRACTS.**

The reduction of an agreement to writing, signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should not be complete as a contract, until so written and signed.

*Montague et al. vs. Weil & Bro., 50.*

When it clearly appears from the evidence that the intent of parties was to form a written contract, neither party will be bound until the contract has been reduced to writing, and signed by both. No alleged verbal agreement, in such case, can be invoked by either party against the other.

*Louisa Fredericks, Tutrix, vs. Robert Fasnacht, 117.*

Contracts having an unlawful or immoral cause are not merely void themselves, but as a rule, can not be the basis of any valid auxiliary contract.

*Cummings vs. Saux, 207.*

When one party submits a proposal for a contract to another, and the latter's acceptance of the proposal includes a material modification of the proposal, no contract will result until the modification has been acquiesced in by the party making the proposal.

*Nicholas Connell vs. Alexander Hill, 251.*

Where in a contract to deliver a certain thing, no time for the delivery is fixed, the legal implication is that it shall be delivered within a reasonable time from the date of the contract.

*Robert H. Bartley vs. City of New Orleans, 264.*

**CONTRACTS—Continued.**

Where the evidence shows that the parties intended, originally, that the contract of lease should be reduced to writing, neither will be bound until it is signed by both.

*Miguel Avendano vs. I. W. Arthur & Co., 316.*

A planter who has agreed to consign, and pay commissions on his *entire* crop to his factors, in consideration of certain promises and stipulations in his favor made by the factors, is released from his obligation to consign and pay such commission on whatever balance of his crop he may have on hand, when the factors shall fail and refuse to comply with *their* stipulations; more particularly when the failure of the factors to perform their part of the contract, disables the planter from performing his part of it.

*Nalle & Cammack vs. A. L. D. Conrad et al., 503.*

One who has formed a valid contract can not claim a release from its obligations, on account of an error of judgment, or ignorance of the law regulating the rights and obligations of married women, in this State, when it appears that he had another motive for making the contract, besides the error of law, and no fraud, or bad faith is shown on either side.

*Forrester vs. Mann, 542.*

Ministers of the Methodist Church are entitled to recover for their services, as ministers, whatever salary their congregations may have contracted to pay them.

*Jones vs. Trustees of the Congregation of Mount Zion, 711.*

The written agreement of a debtor who has borrowed certain bonds, to return bonds of the same description, for the same amount, at a certain term, is not a promissory note for the amount of the bonds. The obligation is to return the specific bonds at the time fixed, or pay their value at that time.

*Blouin vs. Liquidators of Hart & Hebert, 714.*

Those are third persons to a contract who are not parties to it.

*Van Loan vs. Heffner, 1213.*

**CONTRIBUTORY NEGLIGENCE.**

SEE DAMAGES.

**CO-PROPRIETORS.**

Where property sold at public sale is bought by three persons in indivision, each being entitled, by agreement among themselves to a certain undivided portion of the property, any one of the common owners who has paid his share of the adjudicated price, has a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the co-proprietors is entitled to oppose the demand on the ground that the taxes on the property have not been paid.

*Nathaniel Montross vs. Samuel Jamison, 172.*

**CORPORATIONS.**

**A** mere change in the title of an officer who performs certain, described functions in the government of a city, will not make him amenable to the operation of a summary writ, from which, under his former title, he was exempted by special statute.

*State ex rel. Strauss vs. Brown, 78.*

**Under** a contract with a city corporation to do certain work, a contractor can not claim compensation for new, and additional work done by direction of a city official, without the consent of the city, which was not stipulated for in the contract expressly, or by implication, and which cost more than the work actually contracted for.

*O'Hara vs. City of New Orleans, 152.*

**When** it appears that the parties in charge of the property and affairs of a corporation, as liquidators of the same, have been elected as such by the stockholders of the corporation, and their election has not been set aside, and no fear of fraudulent action on their part is alleged, no court is authorized to displace them, and appoint a receiver in their stead.

*John F. Follett et al. vs. Spencer Field, President, et al., 161.*

**A** municipal corporation authorized by its charter to construct wharves on its river front, and impose wharfage dues for the use of its wharves, has the right to collect such dues, proportioned to the vessel's tonnage, on all vessels that land at, and make use of the wharves constructed by such corporation. The collection of such dues does not violate any provision of the constitution of the United States.

**Where** a municipal corporation, under the express authority of an act of the Legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is a vested right, and can not be abrogated, or impaired, by any subsequent act of the Legislature.

*Henry Ellerman vs. John McMains et al., 190.*

**A** contract entered into by a member of a city council, either in his own name or in the name of another person, which the charter of the city prohibits him from making, is absolutely null and void.

*P. H. Cummings, J. H. Cummings, Subrogee, vs. J. M. Saus, 207.*

**A** legal by-law of a corporation which provides that no shares of its stock shall be transferred on its books, until the certificate thereof has been surrendered to its president, or shown to be lost, is binding on all its stockholders, and their heirs. Before the heirs of a deceased stockholder can compel the corporation to transfer shares, or pay accrued dividends to them, they must comply with the requirements of the by-laws.

*State ex rel. Martin et al. vs. N. O. & Carrollton R. R. Co., 308.*

CORPORATIONS—*Continued.*

When the charter of a corporation provides that in case any subsequent increase of the capital of the concern is authorized, notice of sixty days shall be given of such increase, within which time the stockholders shall have the privilege of taking additional shares, proportioned to the amount of their stock, and that any shares, not taken at the expiration of that time, may be disposed of by the directors for the benefit of the association,

*Held*—That in order to entitle a stockholder to demand said additional shares, it must appear that he applied for the shares, and paid over or tendered the money, necessary to purchase the same, before the expiration of the sixty days; or before the expiration of any additional delay, which may have been given by the corporation to enable the stockholders to exercise said privilege.

*Mrs. Emily L. Hart et al. vs. St. Charles Street Railroad Co., 758.*

A corporation which is entitled by its charter to sue for fines and penalties for violations of its privileges, is likewise entitled to sue out writs of injunction to prevent and restrain from the violations of those privileges.

*Crescent City Live-Stock and Slaughter-House Company vs. Larriveux, 798.*

Section 2593 *et seq.* of the Revised Statutes of 1870 does not provide for the forfeiture of the charters of corporations at the instance of private persons, even when they are parties interested.

*The State ex rel. Martin Lannes et al. vs. the Attorney General of the State, 954.*

No loss suffered by a stockholder, in consequence of a call authorized by the charter of the corporation, made upon each stockholder to pay a proportion of the price due on his stock, will give rise to a claim for damages against the directors of the corporation.

*Succession of Woods, 1002.*

Where the charter of a municipal corporation requires the mayor's sanction to all the enactments of the Board of Selectmen, such enactments will be inoperative unless signed by the mayor.

The promulgation of an ordinance enacted by the Board of Selectmen of Breaux's Bridge, by merely posting the ordinance, is without effect, when the ordinance has not been signed by the mayor, and by the secretary of the board.

No law or ordinance passed by a town council can have any binding effect unless promulgated and preserved in the English language.

When the fact is denied that a certain ordinance has been enacted by a town council, the fact can only be proved by the deliberations of the council, and their promulgation, duly attested.

*Mayor et al. of Breaux's Bridge vs. Valerien Dupuis, 1105.*

**CORPORATIONS—Continued.**

The stockholders of a corporation have no right to appropriate any part of its assets to pay salaries due them as officers of the company, or due them on any other account, until all creditors, who are not stockholders, have been paid.

*Cochran vs. Ocean Dry Dock Company, 1365.*

The *bona fide* sale of the stock of an incorporated company, coupled with a power of attorney to the vendee to transfer it on the books of the company, is made complete by the delivery to the vendee of the certificate of stock. It is not necessary to the perfection of the sale, and the consequent protection of the stock from the seizure of the vendor's creditors, that notice of the sale should be served on the corporation, or that an actual transfer of the stock should have been made on its books.

*Samuel & A. W. Smith vs. Crescent City Live-Stock Landing and Slaughter-House Company, 1378.*

**COSTS.**

The costs of a suit brought by the holder of bonds to compel the Board of Liquidators to fund his bonds, must be paid out of the treasury of the State, if the Board is cast in the suit.

*Hamlin et al. vs. the Board of Liquidators, 443.*

In all appeals to this court the appellant is primarily liable for all the costs occasioned by the appeal, and may be compelled to pay them.

*State ex rel. Ballor vs. Judge of the Fourth District Court, 599.*

**COUNTER-LETTERS.**

Counter-letters can have no effect against creditors, or *bona fide* purchasers.

*Billgery vs. Ferguson, 48.*

**COURTS.**

The death of a defendant to a suit pending in a court of ordinary jurisdiction, does not divest that court of jurisdiction, and work the transfer of the case to the probate court. The suit remains where it was instituted, but only to be proceeded with when the legal representative of the deceased defendant is made a party.

The probate court of a parish has no authority to appoint a curator *ad hoc* to represent the heirs of a deceased defendant to a suit pending in a court of ordinary jurisdiction, when the succession of the deceased has not been opened; only the court before which the suit is pending has the legal right to appoint such a curator.

*Bussy & Co. vs. Nelson, 25.*

Where by a judgment of the circuit court of the United States the assets of a corporation have been taken possession of, and placed in the hands of a receiver, no writ of attachment, or any other process can legally issue from any other court to disturb the re-

**COURTS—Continued.**

ceiver's possession of such assets, or take effect on any right, or debt, that may have accrued in favor of the corporation after the receiver had qualified, and taken charge.

*Gest & Atkinson vs. N. O., St. Louis, and Chicago Railroad Company, 28.*

The act of the Legislature passed in 1877, which gives to the Third District Court of the parish of Orleans, in certain enumerated cases, concurrent jurisdiction with the Fourth, Fifth, and Sixth District Courts of said parish, is not in violation of any provision of the State constitution.

*Lord Cecil et al. vs. the Board of Liquidation, 34.*

When the crime charged in the indictment is one of which the Superior Criminal Court has jurisdiction, the finding of the jury for any smaller crime will not divest that court of jurisdiction.

*State vs. Malloy, 61.*

The State courts have jurisdiction to determine whether a debtor is released from certain debts, by his discharge in bankruptcy.

*Succession of R. H. Bayly. Opposition of Washington and Lee University, 75.*

In criminal cases this court have no jurisdiction of questions of fact.

*State vs. Harris et al., 90.*

The question whether one of the jurors in a criminal case was, or was not disqualified to act as a juror, on the score of being too prejudiced to render an impartial verdict, is a question of fact for the lower court to determine, and of which this court has no jurisdiction.

*State vs. Shay, 114.*

The Second District Court for the parish of Orleans is without jurisdiction of a suit, brought by the purchaser of property at a tax-sale, to be put in possession of the property.

*William A. Gordon vs. Miss Marie C. Goulé, 138.*

The parish court is without jurisdiction of a suit for partition between the surviving widow and the heirs of the decedent, when it appears that the widow had accepted and disposed of her interest in the community, and that the heirs, who are of age, had unconditionally accepted the succession and been put in possession of its property. In such a case the succession no longer exists.

*Sarah and Austin Woolfolk vs. Mrs. Emily Woolfolk, 139.*

The probate court has no jurisdiction of a suit brought by the heirs of one succession, against the executor of another succession, for a partition of property which belongs, in certain undivided proportions, to both successions.

*Boutté et al. vs. Executors of Boutté, 177.*



**COURTS—Continued.**

Where the issue involved in the verdict of a jury, and judgment of the lower court, is damages for an alleged assault and battery, this court will not disturb such verdict, and judgment, where they do not clearly appear to be unjust. *Johns vs. Brinker, 241.*

A mortgage creditor has the legal right to proceed by executory process in a court of ordinary jurisdiction, against any property of a succession to which his mortgage attaches, and subject the proceeds of the property to the satisfaction of his debt.

*Hypolite Gally vs. Michael Dowling, Curator, 323.*

The Third District Court for the parish of Orleans having exclusive jurisdiction of all suits to enjoin proceedings in justices' courts, the Superior District Court was utterly without jurisdiction of such suits, and had no power to impair, or interfere in any way, with this exclusive jurisdiction of the Third District Court.

*Mrs. Mary Sexton vs. M. O. Sullivan et al., 342.*

This court has not jurisdiction of a suit against the executor of a succession, when the amount claimed is less than \$500, and it further appears that all the assets of the succession have passed into the hands of the heirs.

*Succession of John L. Pointer. On Opposition of Messrs. Barrow & Pope and V. J. Dupuy, 370.*

The question of the sufficiency, or insufficiency of the evidence to convict, is one of which this court has no jurisdiction.

*State vs. Snow, 401.*

The parish courts have exclusive jurisdiction in ordinary suits in all cases where the amount in dispute exceeds one hundred dollars, exclusive of interest, and does not exceed five hundred dollars, exclusive of interest.

Thus, where the *principal* of the amount in dispute is exactly \$500, the parish courts have jurisdiction, even though there be enough accrued interest demanded to make the whole amount in dispute much more than \$500.

*Adam Decklar vs. D. Frankengerger, 410.*

This court has direct and exclusive jurisdiction of appeals in *all cases* whether instituted in district, or justices' courts, where the constitutionality and legality of a tax is put at issue; irrespective of the amount in dispute. And this jurisdiction will not be ousted, or impaired because there are questions of fact in the case, distinct from that of the constitutionality of the tax. In all cases, except criminal cases, of which this court is vested of jurisdiction, it has authority to pass on all questions of fact, or of law, involved; and the appellant from a judgment of a justice's court, involving the constitutionality of a tax, can not defeat the jurisdiction of this court

COURTS—*Continued.*

by waiving that issue, and appealing to the Third District Court on a mere issue of fact in the case.

*State ex rel. Victor Boutroue vs. the Judge of the Third District Court of Orleans et al.*, 415.

In actions to annul, and enjoin judgment, as between the parties thereto, the jurisdiction of this court depends on the amount of the judgment sought to be annulled, and not on the value of property seized under it, or the amount of damages claimed by the appellant. Thus if the judgment sought to be annulled is under \$500, the appellant can not give jurisdiction to this court by setting up a claim of damages for more than \$500.

*William L. Cushing et al. vs. Sambola & Ducros et al.*, 426.

The parish court in which a succession has been opened, and which has thus acquired control of the property of the succession, has jurisdiction of a suit brought by the heirs of the succession to enjoin and prohibit the nominal administrator of the succession from acting as such, and from executing a certain judgment obtained by him, as administrator, in the district court.

*Marietta J. Brown and Husband vs. J. N. Brown, Administrator*, 506.

The parish court has jurisdiction to emancipate a minor, even when the minor is the owner of property worth more than \$500.

*Cooper and Wife vs. Rhodes*, 533.

State and parish officers, and the sureties on their official bonds may be sued, on account of any malfeasance of such officers, in the courts of the parish in which the officers exercise, or may have exercised their functions, no matter where their domiciles may be.

*School Board vs. Emile L. Weber et al.*, 593.

Corporations can not be sued in any other but the courts of their domicile for damages arising out of their passive breaches of contract. It is only for damages caused by an *active* breach of contract that they can be sued away from their domicile, and in the parish where the damage has been done.

*J. W. Montgomery vs. the Louisiana Levee Company*, 607.

When three individuals, not partners, or otherwise associated in business, whose rights are several, and distinct, unite in one petition and claim that by some alleged wrong of the defendant, they will be jointly damaged to the extent of only one thousand dollars, this court will not have jurisdiction, since the interest of each plaintiff is less than five hundred dollars.

*John Larrieux et al. vs. Crescent City Live-Stock Landing and Slaughter-House Company*, 609.

**COURTS—Continued.**

Where a suit involving conflicting liens and mortgages on certain property is instituted in one court, and all persons in interest are made parties to the suit, the subsequent institution of another suit, in a different court, by two of the parties is a fraud on justice, and will not divest the former court of jurisdiction to determine all the issues between the parties, in respect of the mortgaged property, without regard to any changes in the title or possession of the property.

*Barkdull vs. Herwig & Smith, 618.*

When the original claim of a judgment creditor when first sued on in a district court is over \$500, the mere fact that subsequent payments made by the defendant have so reduced the amount of the judgment that it can not be appealed from, can not have a retroactive effect so as to divest the district court of jurisdiction of the suit, or impair its right to issue executions as long as any part of the judgment remained unsatisfied.

*Picard & Weil vs. Wade, 623.*

In the absence of evidence as to the amount in dispute in a suit on appeal before this court, it will not be inferred that a sufficient sum is involved to give this court jurisdiction merely from the fact that there were two judgments of the district court enjoined. This court will not assume jurisdiction on an inference.

*H. R. Wade vs. R. J. Loudon and Sheriff, 660.*

A sentence of the lower court sending a party to prison for some act of contempt committed during the trial of a case, is no part of the case, and hence the amount in dispute in the case has no bearing on the question of the jurisdiction of this court as to the sentence of the lower court in the matter of the contempt. Nor can an allegation that the imprisonment of the petitioner will damage him to an amount above the appealable sum, give this court jurisdiction.

*James Wood to the Court, 672.*

The district court is utterly without jurisdiction of a suit by parties against the succession of their former tutor, then under administration in the parish court.

*Lusk vs. Succession of Benton, 686.*

After the bond required by the lower court has been given, and filed, that court has no further jurisdiction of the case, except to pass upon the solvency and sufficiency of the sureties on the appeal bond. The lower court can not set aside a suspensive appeal, or make it a devolutive one, on the ground that the amount of the bond (fixed by itself in a case where the court is required to fix it) is not the correct amount.

*State ex rel. Kramer vs. Judge Sixth District Court, 1014.*

The parish court has exclusive jurisdiction of suits to annul wills, and set aside the probates of the same.

The nullity of proceedings for the probate of a will, and of the orders

COURTS—*Continued.*

in execution of it must be sued for in the court which decreed the probate, and made the orders.

If different causes of action be alleged in a suit brought in a probate court, of some of which causes the court has jurisdiction, and of some, not, it should take cognizance of the former causes and reject the latter.

Where a court has once acquired jurisdiction of a suit, that jurisdiction will be maintained. It can not be impaired by a claim in reconvention, or intervention, of which the court has not original jurisdiction.

A demand in intervention must be before the court in which the main action lies, and must follow that jurisdiction when it is really incidental and collateral to the main suit.

One whose title to lands (worth over \$500) depends on the validity of a certain will, may intervene in a suit brought in the parish court to annul the will, in order to set up, and vindicate his title, and the intervenor's title, being thus put at issue, the plaintiff may contest it to show that the former had no right to intervene. But no inquiry into the validity or enforcement of mortgage claims on such lands, set up by the plaintiffs, will be allowed.

A parish court which is without jurisdiction of a suit brought before it, has no authority to issue an order to transfer the suit to the district court. It has only power to dismiss the suit.

*Succession of Jacob Hoover et al. vs. Z. York and E. J. Hoover, Executors. A. G. Ober, Intervenor, 752.*

A resident of the Sixth Municipal District of the city of New Orleans sued in one of the district courts for the parish of Orleans, and served with citation prior to the seventh of November, 1876, remains, as to that suit, subject to the jurisdiction of said court.

After a case has been fixed for trial the court is without authority to order it to be tried by jury.

*Wm. Reed Mills vs. J. Q. A. Fellows, 824.*

A suit instituted in one parish before a certain district judge, may, by consent of all the parties, be legally tried, and decided by the same judge while holding court in another parish of the district.

*James Sharkey, Tutor, vs. Leslie Bankston, 891.*

Where the legality of a tax is in dispute this court has jurisdiction irrespective of the amount involved. *The State vs. David Sies, 918.*

The probate court has jurisdiction to order the sale of the property of an insolvent succession without convoking a meeting of its creditors.

*Succession of Lacroix, 924.*

A parish court is not competent to review, or reverse a judgment of the district court.

*Succession of Quin, 947.*

**COURTS—Continued.**

A suit against a party for an amount due by a vacant succession, on the ground that the defendant had made himself liable by taking unauthorized possession of the effects of the succession with intent to convert them to his own use, is not a suit against the succession, and hence, none but a court of ordinary jurisdiction can take cognizance of it. *Peet, Yale & Bowling vs. Nalle & Cammack, 949.*

A suit to revive the judgment in a probate case, rendered by a district court before the creation of parish courts by the constitution of 1868, must be brought in the district court that rendered the judgment. Probate suits in which judgments had been rendered, were not transferred from the district to the parish courts.

*Thomas LaChambre & Co. vs. Henrietta and J. L. Cole, 961.*

The suit brought by an executor against a third person who is the undivided half-owner of certain property, of which the succession owns the other half, for the purpose of effecting a partition of the property, and also for a settlement of accounts with the defendant, does not involve probate matters, and therefore the probate court in which the succession was opened has no jurisdiction of the suit.

*Succession of R. H. Baily vs. M. A. Becnel, 1032.*

When the constitutionality of a tax is at issue, this court has jurisdiction regardless of the amount in dispute.

The justices' courts have authority to issue injunctions in all tax suits brought before them of which they have jurisdiction.

When a party sues in a justice's court to enjoin the collection of an alleged illegal tax, it is not necessary to allege any specific indebtedness by way of damages, in order to give the court jurisdiction.

*Frank Gonzales vs. J. T. Lindsay, Tax Collector, 1085.*

In an action to annul a *dation en paiement* of certain property worth more than \$500 the district court has jurisdiction, although the debt due the creditor who sues to annul is less than \$500.

*Queyrouze & Bois et al. vs. P. E. Thibodeaux et al., 1114.*

The parish judge has authority to sentence the accused to imprisonment in the Penitentiary in criminal cases wherein the defendant has waived trial by jury.

*State vs. Williams, 1162.*

The jurisdiction of this court does not extend to cases of conviction under act No. 9 of the Legislature passed in 1874.

*The State ex rel. A. Agusti vs. J. D. Houston, Sheriff, 1174.*

The parish courts have exclusive original jurisdiction of suits brought against the administrator of a former tutor by the former wards of the latter for a settlement of the tutorship.

*Cawthorn vs. Cawthorn, 1181.*

The parish court has exclusive original jurisdiction in all ordinary suits, in which the sum involved is less than \$500 exclusive of interest.

**COURTS**—*Continued.*

This court has appellate jurisdiction of all judgments rendered by the district court in cases appealed from the parish courts, when the amount involved, including principal and interest, is more than \$500.

*Newman Brothers vs. S. E. Cuney, 1201.*

A valid and legal decree of a parish court can not be arrested at the instance of the judgment debtor, by an injunction issuing from any other court.

*R. G. Cobb, Curator, vs. T. P. Richardson, Sheriff, et al., 1228.*

This court has jurisdiction of all suits which involve the legality of a tax, without regard to the amount in dispute.

*The Parish of Lincoln vs. J. G. Huey, 1244.*

Where a party agrees to pay a certain stated account made up of principal and accrued interest, and the aggregate amount of the principal and interest exceeds \$500, the district court will have jurisdiction of the debt.

*I. Bloom & Co. vs. Leon Kern et al., 1263.*

This court is without jurisdiction to consider the testimony of witnesses, and disputed questions of fact, on which applications for new trials in criminal cases are made.

*State vs. Beatty, 1266.*

The district court has jurisdiction of a suit brought by one heir against his co-heirs for his share of the succession, which has been administered and is at an end.

*Harrington vs. Barfield et al., 1297.*

The jurisdiction of the Second District Court for the parish of Orleans is exclusively probate, and it has no power to entertain a question of title to real estate claimed by majors alone.

A suit for the partition of property which belongs in part to minors, and in part to majors, does not fall within probate jurisdiction. It must be brought in a court of ordinary jurisdiction.

*W. S. Benedict vs. J. A. Florat, Tutor, et al., 1337.*

No district court of the parish of Orleans has authority to issue a writ of injunction to restrain the execution of a judgment rendered by any other district court of that parish. The court which renders the judgment can alone enjoin its execution.

*State ex rel. J. P. Becker vs. Judge Sixth District Court, 1350.*

A suit by forced heirs against those in possession of the property of the succession, claiming to be owners under an executed will, instituted to annul the whole or part of the will, is properly brought in the probate court in which the will was admitted to probate and executed.

*John Blasini vs. Succession of Silvestre Blasini, 1388.*

An action of revendication of an immovable may be brought where the defendant resides, or where the property is situated.

A suit for the rents of the immovable involved in an action of revendication is properly brought where the property is situated.

*Charles Maduel, Executor, et al. vs. Jules Tuyes et al., 1404.*

**CRIMINAL LAW.**

The judge presiding at a criminal trial can not, either in his charge to the jury, or at any time during the trial, declare the existence of any fact bearing on the case at issue, or deny the existence of any such fact, when it is asserted to the jury by the counsel of the accused in the course of his argument.

*State vs. George Washington et al., 49.*

A criminal information may in two separate counts, charge two separate, but kindred offenses, growing out of the same transaction. Such an information is not obnoxious to the objection of duplicity.

An information charging the crime of burglary, or grand larceny, describes the place where the offense was committed with sufficient certainty when it gives the parish, the name of the owner of the house, and the house in which the offense is alleged to have been committed.

Where an information under the count of grand larceny, charges the theft of various things of small value, a verdict of the jury that the accused is guilty of "petit" larceny is sufficiently responsive to the indictment, and does not amount to an acquittal on the count of grand larceny.

*The State vs. Pat. Malloy, 61.*

On the trial of a motion in arrest of judgment in a criminal case, evidence will not be admitted to prove any error complained of, unless the error appears on the face of the indictment, or the proceedings.

After a verdict has been returned in a criminal case, it is too late to object to the composition of the jury that rendered the verdict, on the ground that some of the jury were too ignorant, or too illiterate to understand the evidence. Such objection should have been made a ground of challenge to the disqualified jurors.

The objection that the jury in a criminal case were not summoned under an order of the court before which the accused was tried, will not be sustained, on a motion in arrest of judgment, when it appears that the jury was summoned by a competent officer, before a competent court.

*State vs. Moses Harris et al., 90.*

An accused person, who with full knowledge of the fact that the jury by whom he is to be tried was drawn from a list of persons, composed partly of those who had been excused from serving, goes to trial without making any objection to the composition of the jury, thereby waives his right of objection, and can not thereafter, on that ground, ask that the verdict of the jury shall be disturbed.

The place where an alleged murder was committed is set forth with sufficient certainty, when the indictment gives the name of the parish in which the killing is charged to have been done, and states that it

**CRIMINAL LAW—Continued.**

took place within the jurisdiction of the court before whom the accused is tried.

In an indictment for murder it is not necessary to set forth the specific manner, and means of the killing. It is only necessary to charge that the accused did willfully, feloniously, and with malice aforethought kill, and murder the deceased.

It is too late to urge any objection to an indictment on account of any defect of form apparent on its face, after the jury has been sworn.

*State vs. Daniel Shay, 114.*

The facts set forth in the affidavit of a party accused of a crime, in support of his motion for a continuance, are, for the purposes of the motion, to be taken as true. They can not be traversed, or contradicted by counter affidavits, or other evidence.

When the confessions of a prisoner to the committing magistrate have been reduced to writing, but on being offered in evidence on the trial of the accused, are, on his motion, rejected on account of defects of form in the writing, his voluntary declarations to the magistrate may be proved by parol.

To warrant a conviction on circumstantial evidence, it is necessary that the circumstances should be of such a nature, and so related, as to leave no reasonable doubt that the accused is guilty of the offense with which he is charged. It is not necessary that the circumstances should produce that positive conviction which would flow from the testimony of a reliable witness.

*The State vs. Alfred Simien, 296.*

The words "against the peace and dignity of the same" need only conclude those averments in an indictment which are necessary to perfect it as an indictment. The words need not conclude a recital of facts following the essential averments, inserted merely to provide against an apprehended plea of prescription.

Where a party has been indicted and convicted of shooting with intent to murder, and on appeal this court sets the verdict aside, and orders the custody of the accused until the finding of a new bill, the plea of prescription of one year, on the ground that the new bill was not found until after a year from the commission of the offense, will not be maintained.

*The State vs. Jacob Thomas, 301.*

A verdict of conviction in a criminal case will not be set aside, and a new trial granted, on the ground that one of the witnesses for the State has made unsworn statements since the trial, which contradict his testimony on the trial; especially when it appears that in the opinion of the judge below the testimony given by other witnesses on the trial fully warranted the conviction.



**CRIMINAL LAW—Continued.**

When an indictment for the larceny of an animal charges the crime of larceny with all the fullness, and precision required by law, the addition of the words "and kill," will be treated as mere surplusage. They will not change the character, or lower the grade of the crime charged.

*The State vs. Jim Johnson, 305.*

It is so absolutely necessary to the validity of criminal proceedings and the verdict found thereon that a plea on his behalf should be filed to the indictment found against the accused, that the failure to file such a plea will vitiate the proceedings, and justify the setting aside of the verdict.

The presence of the accused, at the time the verdict against him for a felonious offense is received, is essential to the validity of the verdict.

Under an indictment for one offense a legal conviction can only be had for another offense of less magnitude, when the latter offense is of the same nature, or kind, as the one charged. Thus, under an indictment for burglary, a verdict convicting the accused of petit larceny is invalid.

*The State vs. Alfred Ford, 311.*

The absence of a witness is not ground for continuance in a criminal case, unless the defendant, in his application for a continuance, makes oath that he can not prove by any other witness, the facts he seeks to prove by the absent witness.

Where three persons have been jointly indicted for the same crime, the condemnation and sentence of two of them will not be disturbed, because the verdict against the two was rendered in the absence of the third.

Where the defendant in a criminal proceeding, pending the argument on his motion for a new trial, moves to amend his motion, on new and different grounds that alter its substance, it is within the reasonable discretion of the court to allow, or refuse the amended motion.

Except in cases of conviction for felonies, it is not necessary to ask the accused if he has any thing to say why the sentence of the law should not be pronounced on him, when it appears that no prejudice to the accused resulted from not putting the question.

*The State vs. Andrew Bradley et al., 326.*

Where two persons are jointly charged with the commission of a crime, the State is entitled, on a proper showing, to a continuance as to both, even though one of the accused is ready for, and demands a trial.

*State vs. Brooks, 335.*

The defendant who is on trial for murder, can not introduce evidence of the quarrelsome or dangerous character of the deceased, in justifi-

CRIMINAL LAW—*Continued.*

cation ; but he may introduce evidence of such character, in excuse for the killing, or in palliation of the offense, provided he first shows he was actually attacked by the deceased, and that he was aware of the latter's character.

In an indictment for murder or manslaughter, the character and nature of the wound which caused the death need not be set forth. The indictment need only charge that defendant did *willfully, feloniously, and of his malice aforethought kill and murder the deceased.*

*The State vs. Augustin Robertson, 340.*

As a general proposition, the question whether an application for a change of venue in a criminal case shall be granted, or refused, is a question which is confided exclusively to the discretion of the lower court.

The charge given by the judge to the jury, in the trial of a criminal case, to the effect that unless it was shown that the killing was done while the deceased and accused were clutched, or in actual combat, it was not done in the heat of passion, but through malice, is fatally erroneous, and will authorize the setting aside of the verdict. The special grade of crime involved in a homicide, is not to be determined by the mere fact that the parties were, or were not, at the moment of the killing involved in an actual struggle, but by other facts showing malice, or the absence of malice.

*The State vs. James V. White, 364.*

The trial of a criminal case without any plea having been filed by, or on behalf of the accused, is fatally irregular ; and any verdict against the accused, in such a case, will be set aside.

Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled and set aside.

When the entry in the record of a criminal case states that the jury were duly sworn and impaneled, it will be presumed that all of the jurors were sworn, although only eight of them are *expressly* mentioned as having been sworn.

Denunciation of another jury, for having found a wrongful verdict in a different case, (made by the district attorney in the argument of a criminal case,) although objectionable, is not ground for setting aside a verdict.

Indictments charging the crime of larceny, and burglary, may be repeatedly amended during the trial of the case, in order to set forth the names of the real owners of the property charged to have been stolen.

Even after the jury in a criminal case have been impaneled, the state-

**CRIMINAL LAW—Continued.**

ment of defendant's counsel that they would impeach the character of a brother of one of the jurors, who was a witness for the State, may, sometimes, but not always, make it proper for the court to excuse the juror.

Where the accused, who is charged in one indictment with burglary, and grand larceny, has been convicted of burglary, the entry of a *nolle prosequi* as to the charge of grand larceny, will not warrant an arrest of judgment.

*The State vs. Joseph Christian, 367.*

An information for uttering a forged bill is prescribed by the lapse of one year from the time the offense was brought to the knowledge of the officer charged with the prosecution.

Forging a document, and uttering that document are two separate and distinct offenses, and hence the charge of one, in an information, will not include a charge of the other.

When the plea of prescription appears good, on the face of the information, the burden of proof is on the State to show that the plea is not well founded.

The allowance of an amendment to an information, changing the date of the bill charged to have been forged and uttered, allowed during the trial, and after certain admissions of the accused, will not warrant the rejection of the admissions, nor an arrest of judgment, when it appears that no injury to the accused resulted from the amendment.

*The State vs. R. W. Snow, 401.*

The mere fact that the prosecuting attorney in a trial for murder, read to the jury a definition of malice, from a manuscript he refused to allow the attorney for the accused to see, will not authorize a verdict to be set aside when the accused does not allege that the said definition of malice was incorrect, and when it appears that the judge instructed the jury not to regard what was thus read from the manuscript.

When it is shown that a wound which might be fatal has been inflicted by the accused with a murderous intent, then the burden of proof is on him to show that the death of the accused resulted from malpractice, or culpable neglect of the attending surgeon, or from some other cause other than that of the wound.

*The State vs. John G. Briscoe, 433.*

In putting questions to witnesses in a criminal trial it is not permitted to assume as true, facts which have not been proved, and which the jury alone are charged with finding.

One witness can not testify in a criminal trial as to what another witness said on the examination before the committing magistrate, when

**CRIMINAL LAW—Continued.**

that other witness is present in court, and not disqualified, and when it is not sought to contradict him.

The mere fact that an accused when under examination before a magistrate does not rise up and contradict the witnesses who testify against him, does not warrant the implication that he thereby confesses the truth of their statements.

To make the declarations of others evidence against an accused, when made out of his presence, it must be first shown that there was a conspiracy between him and them.

*State of Louisiana vs. Richard Smith, alias Dick Smith, 457.*

When a bill of exception to a ruling of the judge in a criminal trial contains a statement of facts in opposition to his own recollection, and his notes of evidence, he is justified in refusing to sign the bill, and to hear any evidence to contradict his own recollection and notes.

A prisoner has no right, under the law, to a service on him of a list of the talesmen summoned.

The confession of a prisoner, if received in evidence, must be received as a whole; but it is for the jury to determine whether the whole of it, or any part of it is entitled to credit; and if so, how much credit.

To offset his declarations to one person, offered in evidence by the State, the accused has no right to introduce in evidence other declarations of his, made to other persons, unless they were made *at the same time* as those offered by the State.

While this court will review, and consider the evidence taken on a motion for a new trial in a criminal case if brought here by bills of exception, or by affidavits appended to the motion, yet it can not be said that the lower court erred, when such evidence was orally produced, in refusing to have it reduced to writing.

In the interest of justice, this court will sometimes grant a new trial in a criminal case, when no precedent for it exists.

*The State vs. Jacob and David Gunter, 536.*

It is not necessary that an examination of the accused before a committing magistrate should be had, preliminary to the finding of an indictment, or the filing of an information against him.

Under the constitution of Louisiana the prosecution of all offenses, except capital offenses, may be initiated on information filed by the public prosecutor, with leave of the court. This information need not be supported by affidavits.

The amendment of the constitution of the United States requiring the intervention of a grand jury, relates only to crimes cognizable by the United States courts, and to criminal proceedings in those courts.

Where it is charged in an information that a certain instrument, created

**CRIMINAL LAW—Continued.**

by special statute with specific and distinctive features, has been uttered, and falsely published as true, it must be shown, in order to maintain the charge, that the identical instrument thus created, has been thus uttered and published. It does not maintain the charge to prove that *another* instrument has been uttered and falsely published, no matter how close its resemblance to the instrument created by the statute and described in the information.

Before the utterance or publication as true of a certain false and altered instrument can constitute a crime, it must be made to appear that if genuine, it would be evidence of the fact it recites; and that it does, or may tend to prejudice the rights of another.

Where it appears that the utterance and publication as true of a false and altered instrument, can only tend to anybody's prejudice if so uttered and published by the accused in a *certain official capacity*, the failure to charge in the information that the offense was committed by the accused in that official capacity, will render the information fatally defective.

The criminal statutes of this State make it a crime to *alter* a record; they also make it a crime to falsely *publish* as true, an altered record, but there is no such crime known to the law of Louisiana as "uttering and publishing" as true, an altered, false and counterfeited instrument.

*The State vs. Thomas C. Anderson, 557.*

The objection of an accused that the property he was convicted of stealing was imperfectly, and incompletely described in the indictment, should be taken on a motion to quash the indictment, before the jury is sworn. It is too late to urge such an objection, being one apparent on the face of the indictment, on a motion in arrest of judgment.

*The State vs. Bill Thomas, 600.*

Evidence of an offense different and distinct from that charged in the indictment is only admissible in evidence, where it tends to show the intent with which the act charged was done. Thus where the charge is stealing a certain hog, evidence that the accused altered the mark of the hog is admissible.

*Ib.*

One who takes property, or, after having had it in possession for a time releases it, and subsequently retakes it, under a mistaken but honest belief that it was his property, is not guilty of larceny.

*Ib.*

When a bill of exceptions is so expressed as to leave in doubt what the lower judge actually charged the jury on some important point, the accused will have the benefit of the doubt, and the case will be remanded.

*Ib.*

Declarations of an accused in his own behalf are only admissible when they are a part of the *res gestæ*.

*Ib.*

CRIMINAL LAW—*Continued.*

To constitute a part of the *res gestæ* it is not necessary that declarations should be precisely concurrent with the act charged to have been committed; it is only necessary that they spring from it, and are made under circumstances that preclude the idea of design. Thus where one is charged with stealing a certain thing, his declarations that it was his property, made before the alleged stealing, are admissible in evidence. *Ib.*

The addition of the words "with capital punishment" to the verdict of a jury can not affect the verdict. The words are mere surplusage.

*The State vs. William alias Bedford Burns, 679.*

Proof that a homicide was committed in any of the parishes of this State, is proof that it was committed within the State. *Ib.*

The verdict of a jury in a murder case will not be set aside on the ground that the court below refused to hear evidence to prove the desperate character of the deceased, when there is nothing in defendant's bill of exception to indicate the nature of the evidence offered, except that the deceased was a man of desperate character, and nothing to show in what way that fact affected the prisoner's conduct in the killing. *Ib.*

An information charging defendant with breaking and entering a store at night, with intent to steal, which fails to charge that defendant feloniously entered, and fails to charge that he did break, and enter with *burglarious, or felonious intent* to steal, etc., is fatally defective.

*State vs. Curtis, 814.*

No indictment is valid which does not contain an indorsement of the special crime charged, followed by the words "a true bill," and signed by the foreman of the grand jury in his official capacity, in the presence of the grand jury. *State vs. Israel Morrison, 817.*

Where a party is tried for perjury, for having sworn in a civil suit that he witnessed the sale of certain property, he has the right to introduce in evidence the judgment of the court in said suit decreeing that said sale had been made, and the reasons for said judgment given by the court. *The State vs. Elbert Faulk, 831.*

He has also the right to show by witnesses that said sale took place on a different day from the one he had sworn to, even though the effect of such evidence is to contradict and discredit another witness in the case without having laid the basis for such contradiction. *Ib.*

In criminal cases it is not necessary that there should be any foreman of the jury. Nor is it necessary that the verdict of a jury should be written, or signed. It is sufficient that a member of the jury utters the verdict orally. Nor is it necessary that the verdict should express the name of the prisoner, or the specific crime for which he is condemned. *Ib.*

**CRIMINAL LAW—Continued.**

A verdict of conviction will not be set aside on the ground that the State's Attorney refused to call and examine three witnesses present at the trial of the case, and alleged to be cognizant of all the facts of the case, when there is no averment, in the bill of exceptions that the accused was prejudiced thereby, and when there is nothing to show that he did not have a fair and impartial trial.

*The State vs. Albert Williams, 842.*

The crime of murder can not be prescribed. Time therefore is not of the essence of that offense, and therefore the time stated in the indictment is, in general, not material. *Ib.*

As affecting the question of prescription, as to prescriptible offenses, evidence is admissible to show that the accused was a fugitive from justice, from the time the act charged was committed. *Ib.*

The General Criminal Statute enacted by the Legislature of this State May 4, 1805, did not adopt, as a portion of our law, all the crimes and misdemeanors known to the Common Law at that date. It merely adopted the Common-Law definitions of those offenses declared to be crimes by that act, and incorporated as a part of our system, the Common-Law mode of prosecution as to forms of indictment, method of trial, rules of evidence, and all other Common-Law proceedings in criminal cases. *State vs. Henry Smith, 846.*

The crime of incest, although denounced, is not defined by any statute of Louisiana, and hence, there can be no conviction for incest under the laws of this State. *Ib.*

An indictment for larceny which describes the property stolen as "ninety dollars in paper currency of the United States of America," is sufficiently specific. The value of the property need not be alleged. In the absence of proof to the contrary, it will be presumed that a person convicted of crime was properly represented by counsel in the lower court. *The State vs. J. Ziord alias J. M. Warren, 867.*

The State must affirmatively show that the confession made by an accused was voluntary. A confession made by a prisoner under any promise of advantage to him, in consequence of it, must be rejected.

*The State vs. Lee Johnson et al., 881.*

When the record in a criminal case shows that the grand jury came into court and presented an indictment in due form, it will be presumed, in the absence of specific objection and affirmative proof to the contrary, that the grand jury was properly organized.

*The State vs. Washington Tazewell et al., 884.*

The question whether a person tendered as a member of a petit jury sufficiently understands the English language to try the issues of a criminal case, is a question of fact confided exclusively to the decision of the lower court. *Ib.*

**CRIMINAL LAW—Continued.**

Being under the charge of larceny disqualifies a person from serving as a petit juror. *Ib.*

Because a confession of the accused to a prosecuting witness was made in response to a question put by the witness, the confession is not thereby rendered involuntary. *Ib.*

Where the indictment charges that an offense was committed at a certain hour of a certain night, it is sufficient to prove that it was committed at any hour during the alleged night. *Ib.*

It is not necessary, in order to convict one as accessory before the fact to the crime of burglary, to prove that the instrument he furnished his confederate to commit the offense with was actually used by the latter. *Ib.*

The word "pants," in an indictment for larceny, sufficiently describes a thing which may be the subject of larceny.

*The State vs. Joseph M. Johnson, 904.*

Where the jury in a criminal case bring in a verdict not responsive to any charge in the indictment, it is proper for the court to direct them to retire, and bring in a proper verdict.

*The State vs. George Sales et al., 916.*

An indictment which states that one of the accused did "assist and abet" the killing and murdering, and then charges that he was "accessory before the fact to the killing and murdering," is fatally inconsistent. *Ib.*

The confession made by one of two persons jointly indicted for the same offense, and tried together by the same jury, is not admissible in evidence against any one but himself, no matter whether that confession be made in the course of his address to the judge, or in form of a plea of guilty. *The State vs. Ben Weasel et al., 919.*

The verdict of a jury in a criminal case will not be set aside on the ground that while the jury were deliberating on the case, two of the jurors separated from the others on a call of nature, when it appears that they were attended by a deputy sheriff and spoke to no one while they were out. *The State vs. John Johnson, 921.*

It is not within the province of the judge presiding at a criminal trial to give such instructions to the jury, after they have returned a valid verdict in the case, as shall lead to a change, or modification of the verdict. *Ib.*

When in a prosecution for murder based entirely on circumstantial evidence, the State finds it necessary, as a link in the chain of that evidence, to trace to the accused a motive for the homicide in his previous quarrel with the deceased, it is competent for the defense to prove facts showing similar, or stronger motives in others to do the same act. *Ib.*



**CRIMINAL LAW—Continued.**

The statement made by an accused, while in prison on the charge of larceny, to the officer in charge of him, that "if you, (the officer), will take me out of jail, I'll turn up the money," is not admissible in evidence against the accused.

*The State vs. William von Sachs et al., 942.*

In an information charging burglary, and entering a house at night with intent to steal, it is not necessary to give the ownership of the house.

*The State vs. Paul Clifton, 951.*

Evidence that the accused was seen in the immediate vicinity of the scene of the offense at about the hour he is charged to have committed it, is admissible.

*Ib.*

The proper question to put, in order to elicit the reputation for honesty of an accused, is what is the *general* reputation of the accused for honesty, etc.; not what is his reputation with those among whom he dwelt.

*Ib.*

When the jury in a criminal case return a defective verdict, the judge may properly so state to the jury, and thereupon instruct them as to the form in which they should clothe their verdict. But to ask them the question whether it was their intention to find the accused guilty of the crime charged in the information, and to have recorded as their verdict the answer thus elicited, is so grave an interference with the functions of the jury, as will warrant the setting aside of the verdict.

*Ib.*

When no bill of exceptions is taken to any of the rulings of the lower judge during the trial of an application for a change of venue, his decision on the application can not be reviewed by this court.

*The State vs. John Williams, 1028.*

The clerk of the Criminal Court is not qualified to act as a jury commissioner, under the Act No. 44, approved March 8, 1877, until he has taken the special oath prescribed by that act. His failure to take that oath before participating in the drawing of a jury, vitiates the drawing.

*Ib.*

The State has a right to ask the jurors in a criminal case, whether they have conscientious scruples against finding a verdict which would entail capital punishment.

*The State vs. Sarrazin Baker, 1134.*

A witness in a criminal case may be recalled, even after he has been examined and cross-examined.

*Ib.*

On the trial of an accused for murder no specific act of the deceased, unconnected with the killing, is admissible in evidence.

*Ib.*

The crime of manslaughter is prescriptible in one year from its commission.

*Ib.*

The entering of a *nolle prosequi* by the State's Attorney, on a motion to quash an indictment amounts to a voluntary abandonment of the

**CRIMINAL LAW—Continued.**

prosecution, in which case the indictment will not have the effect of interrupting prescription. *Ib.*

Where the regular venire has been exhausted without completing the jury, it is the duty of the judge, if the accused shall so request, to order the sheriff to call the absent members of the regular panel at the courthouse door before the summoning of talesmen to complete the jury. *The State vs. Thomas Ross, 1154.*

It is not necessary that the accused, who is being tried for a felony, should be present in court, whenever any step, no matter how insignificant, is taken in the case. *The State vs. Lou. Outs, 1155.*

Oral observations addressed by the judge to the jury after the reading of his written charge to them, and which are not alleged to contain any error, will not furnish ground for a bill of exception when not objected to at the time they were delivered. *Ib.*

In a prosecution for forging a certain instrument evidence is admissible to show that the accused was in possession of the instrument on the day of its date, and that she presented it in payment of goods purchased by her. *Ib.*

Forging an order for merchandise is a crime under the law of this State, and punishable as such. Revised Statutes, § 833. *Ib.*

Where in a criminal case, in which the defendant has waived a jury, the sentence pronounced on the defendant is not responsive to the decree signed by the judge, the judgment will be set aside and the case remanded. *The State vs. Ishmael Williams, 1162.*

A criminal prosecution and conviction, based on a fatally defective information, or indictment, will not interrupt prescription of the crime charged. *The State vs. S. W. Curtis, 1166.*

In criminal cases an objection to the ruling of the lower court must be put into the form of a bill of exceptions, and the bill must be filed. Article 488 of the Code of Practice, and the amendment thereof, do not apply to exceptions reserved in criminal prosecutions.

*The State vs. Wilson Jessie, 1170.*

Where the information charges that the accused wounded another, with intent to commit murder, the jury may find that he was guilty of inflicting a wound less than mayhem, with intent to kill. The verdict is responsive to the charge. *Ib.*

A new trial will be refused unless it be shown that injustice has been done to the accused. *Ib.*

The amendment of an information which charges an "intent to commit murder," to one which charges an "intent to kill and murder" does not make any substantial change in the information. *Ib.*

Where the verdicts returned by a jury are informal, the judge may properly so inform them, and remand them, with additional instructions, to bring in another verdict. *Ib.*

**CRIMINAL LAW—Continued.**

The continuance of a criminal case can not be asked on the ground of the absence of material witnesses, when it is not shown that due diligence was used to secure the attendance of the witnesses.

*The State vs. Thomas Ryan, 1176.*

The widow is a competent witness to prove the dying declarations of her former husband. *Ib.*

Threats of the deceased against the one on trial for killing him, not shown to have been made in the presence of the accused, or communicated to him, are not admissible in evidence. *Ib.*

It is too late, in a motion for a new trial, to urge objections to the charge of the judge which were not reserved at the time the charge was given. *Ib.*

The charge in an information that the accused was guilty of the larceny of "the sum of twenty-six dollars in current money of the United States of the value of \$26," is sufficiently certain, and descriptive, to warrant a conviction.

*State of Louisiana vs. Daniel Monroe, 1241.*

Carnal intercourse with a female under twelve years of age, amounts, under the law of Louisiana, to the crime of rape. A girl less than twelve years old is incapable of giving consent.

*The State vs. Mike Tilman, 1249.*

All offenses not capital, may be prosecuted on information.

*The State vs. Cooley Newton et al., 1253.*

In an information charging that the defendant did feloniously break into a dwelling-house at night with intent to kill, it is not necessary to charge that he did it "burglariously," or "without being armed," or "without assaulting any person lawfully in the house," or to set forth the name of the person the burglar intended to kill. *Ib.*

The fact that the accused attempted to escape from prison a few days before his trial, on a charge of murder is admissible in evidence. The time of the attempt is not material, as bearing on the question of its admissibility.

*The State vs. James Beatty, alias Wm. Brown, et al., 1266.*

The State may introduce evidence to prove contradictory statements made by the defendant's witness at another time. *Ib.*

Unsworn statements made after the trial of a criminal case by one of the jurors in the case, going to impeach his own verdict, or to show misconduct in the jury, are not admissible in evidence on the application for a new trial. *Ib.*

When, on the application of the counsel of an accused on trial for murder, the judge promises to put his charge to the jury in writing, and up to the close of the trial has failed to do so, the mere fact that the counsel for the accused renounced his right to a written charge,

**CRIMINAL LAW—Continued.**

for fear that the additional delay necessary to enable the judge to write out his charge might prejudice the jury against the accused, will not impair the right of the accused to a new trial on the ground that the judge failed to give the written charge.

*The State vs. James Swayze, 1323.*

This court will grant new trials in criminal cases, but only on pure questions of law. *Ib.*

The charge of the judge in a criminal case that "where the killing is proved, malice is presumed by the law from the fact of killing," is erroneous. It is from the surrounding circumstances, and not from the act of killing that malice is to be inferred, and to be inferred by the jury, and not, as an implication of law, to be applied by the court. *Ib.*

The State has no right, on cross-examination of the defendant's witness, to question the latter as to any fact not connected with the matters stated by him in his direct examination. *Ib.*

The judge presiding at a criminal trial has no authority to state in the hearing of the jury, that a certain explanation given by a witness for the State "was a most important and material explanation." *Ib.*

In order to convict a person, indicted under section 795 of the Revised Statutes of 1870, for biting off an ear, it must be shown that a sufficient portion of the ear was maliciously severed from the body of the injured person by the accused, to attract observation, and impair comeliness.

*The State vs. Moses Harrison, 1329.*

No appeal can be taken in a criminal case after the expiration of the term of court during which the sentence in the case was rendered.

*The State vs. William Harris, 1340.*

**CUMULATION OF SUITS.**

SEE PRACTICE AND PLEADING.

**CURATOR AD HOC.**

Except in cases of attachment, where the law fixes the fee of a curator *ad hoc*, the court can not, *ex parte*, assess and order to be paid the fees of such an officer.

*State ex rel. Louisiana Board of Trustees for the Blind vs. the Judge of the Sixth District Court, 1026.*

**DAMAGES.**

Where the evidence shows that the plaintiff, who was injured by a collision with a railroad car, contributed by his own fault to bring about the collision, he can not recover damages from the railroad company on account of the injury, even though the employees of the company were partly in fault.

*Christian Schwartz vs. the Crescent-City Railroad Company, 15.*

**DAMAGES—Continued.**

If the party who has contracted to deliver a certain thing at a fixed price makes a tender of it at the proper time, and the party who has contracted to receive the thing refuses to receive it, the former may recover from the latter whatever damages are proved to have directly flowed from the latter's breach of contract.

*Bartley vs. City of New Orleans, 264.*

Whoever claims damages, based on a deprivation of prospective profits, must establish such facts in evidence as will enable the court to fix with certainty the amount of the deprived profits. *Ib.*

Where in an action for damages on account of injury done to certain property, the decree of this court merely declares that the defendant is responsible for certain damages, it does not amount to a judgment for the amount of those damages in favor of the plaintiff, who has neither alleged, nor proved that he was the owner of the injured property. In such case the defendant is entitled to allege, and to introduce any pertinent evidence to prove the nature, and limitations of the plaintiff's rights in the injured property; and in no event can he be held for a greater proportion of the damages than the nature and extent of the plaintiff's rights in the property would equitably entitle him to claim. *Burbank vs. Harris, 487.*

Neither the heirs of a deceased wrongdoer nor his widow in community can be held liable in vindictive damages for any wrong committed by him, when no suit for damages has been instituted before his death. The measure of their liability, in such cases, is the actual damage done to the person or property of the sufferer.

*Hillary Edwards vs. Wm. Ricks et al., 926.*

Before a party can be held in damages for failing to do what he has contracted to do, he must be put in default by a written demand, or a verbal demand in the presence of two witnesses.

*State ex rel. Schwing vs. Fontelieu, 1125.*

On the dissolution of an injunction issued at the instance of a *curator ad hoc*, damages will not be allowed against the absent plaintiff; nor against the curator representing him, when it appears that the curator acted conscientiously.

*Cobb vs. Richardson, Sheriff, 1228.*

The owner of a plantation is not liable for damages to an adjoining plantation caused by works erected on his own plantation, in order to prevent its inundation by a destructive overflow of the Mississippi river; more especially when the owner of the adjoining place refused to co-operate in a common work for the protection of both places.

*E. E. Mailhot vs. Robert Pugh, 1359.*

One can not claim indemnity for damages which he has contributed to bring about by his own negligence, or culpable indolence. *Ib.*

**DATION EN PAIEMENT.**

SEE GIVING IN PAYMENT.

**DEDICATION TO PUBLIC USE.**

If it appears from a scrutiny of all the provisions of an act of donation *inter vivos* that it was the real intention of the donor, and of the donees, that the land conveyed by the act should be dedicated to public use, such land will be held as thus dedicated.

*Police Jury of the Parish of Plaquemines vs. Foulhouse et al., 64.*

Property dedicated to public use is not liable to seizure and sale.

Property held by a municipal corporation in trust for public uses can not be alienated by the corporation, nor subjected to seizure and sale by any of its creditors. *Ib.*

Where a certain tract of land has been dedicated to public use—the whole of it remains thus dedicated, although only a part has been actually put to public use. Nor is this dedication at all impaired because a part of the land has been temporarily leased to private individuals. *Ib.*

Land which has been donated to a parish and dedicated to public use, can not be seized for any debt due by the parish.

*Howard McKnight vs. the Parish of Grant, 361.*

**DEFAULT.**

SEE CONTRACTS AND DAMAGES.

**DEFAULT—JUDGMENT OF.**

SEE JUDGMENTS.

**DEPOSITARY.**

A depositary may show by parol evidence that the money deposited with him, and for which he had given his written receipt, was composed of certain bank bills.

*Uranie Bérard vs. Vincent Boagni, 1125.*

A depositary is not liable for any depreciation in the value of bank bills deposited with him, unless it appears that the depreciation has proceeded from his fault, or has occurred after he was in default to restore the deposit. *Ib.*

**DOMICILE.**

When a party has made no declaration of residence, as provided for in article forty-two of the Civil Code, the proof of fact and intention, as regards the question of domicile, is left to the circumstances of each case. *Evans and Husband vs. Payne & Harrison, 498.*

Where a defendant resides alternately in different parishes, without having made a declaration of residence, he must be cited where he appears to have his principal establishment or habitual residence. If his residence in each parish, appears to be nearly of the same nature, he may be cited in either parish, as the plaintiff may elect. *Ib.*

**DOMICILE—Continued.**

A party can not be compelled to appear and answer to a suit brought against him in any other district court but that of the parish of his domicile.

*State ex rel. Thomas W. Nelson vs. Alexander V. Fournet, Assessor, et al., 1103.*

**DONATIONS INTER VIVOS.**

A donation *inter vivos* of movable property can only be made in two ways : by act before a notary and two witnesses, or by actual manual delivery; and one who claims a movable in virtue of a donation, must prove that the donation was specifically made, in one or the other of those two ways.

*Mrs. Mary E. Kirkpatrick, Wife of O'Brien, vs. Finney & Byrnes et al., 223.*

One who has made a donation *inter vivos* of immovable property to his concubine, can not, on the latter's death, recover the property, on the ground that the donation violated a prohibitory law, and was opposed to good morals.

*Robert Monatt vs. E. T. Parker, Public Administrator, 585.*

When the condition on which a donation was made has not been complied with, the donation may be revoked, whether the property donated be in the possession of the donee, or of a transferee of the donee.

*Eskridge vs. Farrar, 718.*

**ERRORS OF LAW.**

SEE CONTRACTS.

**ESTOPPEL.**

Whoever by word or act, purposely persuades another that a certain state of things exists, which induces him to act so as to alter his previous position, is estopped from denying the existence of that state of things.

*Montague et al. vs. Weil & Bro., 50.*

The owner of property which has been illegally seized under a *fi. fa.* and offered for sale, will forfeit his claim for damages on account of the illegal seizure, if he himself has so acted as to countenance the sale of the property under such seizure.

*Bevens vs. Weill, 185.*

The drawee is not estopped from disproving erroneous statements made by him to the holder of a draft as to the amount of the drawer's funds in his hands, or as to the extent of his claim on those funds, when his statements have not induced the holder to alter his position to his prejudice.

*Marqueze & Co. vs. Fernandez & Co., 195.*

The allegation of a plaintiff in a suit to recover property, (alleged to be unlawfully in the defendant's possession) that he had bought the property, but had never paid for it, and hence that it still belonged to the vendor, is not a disclaimer of title, which can be pleaded by

**ESTOPPEL**—*Continued.*

defendant in estoppel, in a subsequent suit to recover the property, brought by the legal representative of the plaintiffs.

*Mary M. Pendegast, Administratrix, vs. Geo. Schawtz et al., 590.*

A defendant can not dispute the title of the person under whom he holds. *Ib.*

Defendants, (having been sued in a corporate capacity), after appearing in their corporate name, and filing an exception and an answer, and plea in reconvention, are estopped from disputing their corporate capacity.

*John K. Jones vs. Trustees of the Congregation of Mount Zion, 711.*

Parties are estopped from denying admissions or declarations deliberately made by them in judicial proceedings.

*Walter C. Compton vs. William L. Sandford, 838.*

When the owner of an immovable is present at a public sale of the same, and tacitly assents to its being sold as the property of another, he is thereby estopped from subsequently disputing the title and possession of the *bona fide* purchaser.

*M. H. Lippmins vs. A. McCranie, 1251.*

A party who in one suit set up a title of ownership to certain property, is not thereby estopped from afterward claiming mortgage rights on the property, as against one who in the former suit denied, and contested his title as owner, and who was in no way injured, or induced to change his position by the claim of ownership set up in the former suit.

*John Chaffe & Bro. vs. Joseph Morgan. J. P. Shultz, Intervenor, 1307.*

**EVIDENCE.**

Extracts from the judgment of another court are not admissible in evidence, in order to show the force and effect of the judgment. A certified copy of the entire judgment, together with all the pleadings that led up to it, must be put in evidence.

*Gest & Atkinson vs. N. O., St. Louis, and Chicago Railroad Company, 28.*

Where the validity of a wife's title to property bought by her during marriage is assailed, and the property is claimed by the husband's creditors as community property, the wife may prove by parol evidence that the property was purchased by her with her separate funds.

*Succession of Pinard vs. Holten et al., 167.*

Testimony given by a witness in one trial can not be introduced to impeach his evidence given in a subsequent trial, unless a proper foundation for it is laid by stating to the witness, at his examination on the second trial, what he had testified on the former trial. *Ib.*



**EVIDENCE—Continued.**

*Prima facie*, the sale, or *dation en paiement* of property, made by a debtor to his creditor, to pay a debt much smaller in amount than the value of the property transferred, at the time when the property is in imminent danger of being seized by the sheriff in favor of a lessor, is fraudulent; and the burden of proof is on the party claiming under such sale, or *dation*, to prove its *bona fide* character.

*Robert Worrell vs. James H. Vickers, 202.*

Under the allegation of fraud, or simulation, touching a transfer of property, every surrounding circumstance bearing on the transfer is admissible in evidence, and will be considered in passing on the character of the assignment. *Ib.*

Whether the journals of the Houses of the Legislature are admissible in evidence to prove that a certain act was passed in disregard of the constitutional forms necessary to give it validity as a law, is an open question before this court.

*Choppin & Beard vs. Louisiana Levee Co., 345.*

Dying declarations made by a deceased person under a sense of immediate and impending death are admissible in evidence.

*The State vs. Judge Spencer, 362.*

Until traversed and disproved, the declarations of the sheriff in his return on a writ of *fi. fa.* are taken to be true.

*Pinard vs. George, 384.*

Parol evidence is admissible to prove the transfer to a third person of a legatee's interest in a succession.

*State ex rel. Hartwell vs. Jumel, Auditor, 422.*

This court will presume that the seal used by one, who styles himself, without contradiction, a commissioner of Louisiana, in authenticating an affidavit made before him, as commissioner, was the seal of a commissioner of Louisiana, until the contrary is clearly, and specifically shown to this court.

*Tunstall vs. the Parish of Madison, 471.*

Documents annexed to and incorporated with the answers filed by a garnishee are thereby properly in evidence, as part of his answers.

*Meyer vs. Deffarge, 548.*

Answers of a garnishee are a part of the pleadings, and are before the court without the necessity of being formally offered in evidence.

*Ib.*

*Quære.*—Whether the consolidated statement, or returns of a supervisor of registration might not be receivable in evidence in an election contest as secondary, or even as the best evidence, in the absence or loss of the returns of the commissioners of election.

*State vs. Anderson, 557.*

The holder of a duly paraphed mortgage note, on which certain credits

**EVIDENCE—Continued.**

are indorsed, is entitled to proceed by executory process for the balance of the note, against the mortgaged property, and the purchaser of the property, whose assumption of the payment of the note appears by a notarial act of mortgage containing the pact *de non alienando*. If such purchaser has gone into bankruptcy, and is represented by an assignee, the certificate of a register in bankruptcy is sufficient evidence of the assignee's appointment and acceptance.

*Dobel vs. Delavallade, 604.*

When a bond sued on is, from the manner of its indorsement, payable to bearer; or the defendant tacitly acknowledges the title of the plaintiff; or no adverse title is pleaded, or suggested in the printed argument of defendant's counsel; or when defendant merely pleads the general issue, the genuineness of the signature to the bond is thereby admitted, and no proof of the payee's indorsement is necessary.

*Lesassier & Binder vs. the Board of Liquidation, 611.*

When an act under private signature is permitted to be read in evidence, without objection, proof of its execution is waived.

*Ib.*

When no statement of facts, showing what evidence was introduced on the trial of the case below, is submitted to this court, it will be presumed that the judge *a quo* proceeded on proper evidence.

*The State vs. H. S. Nicol, Jasper Bowman, et al., 628.*

Parol evidence, even when not objected to, is not admissible to prove that the owner of real estate agreed that it should be sold as the property of a third person.

*Logan vs. Herbert, 727.*

Where a *dation en paiement* by a husband to his wife is attacked, after the wife's death, as fraudulent, the husband is a competent witness for the wife's succession, to prove the amount, and verity of his wife's claims against him.

*Lehman, Abraham & Co. vs. Levy, 745.*

The contents of a judgment may be proved by parol, when the loss of the court records containing the judgment has been accounted for.

*Sharkey vs. Bankston, 891.*

A contract of mandate for the purchase of real estate can not be proved by parol evidence, even when fraud in the alleged agent is set up.

*Fritz Hackenburg vs. Mrs. C. Garstkamp, Tutrix, et al., 898.*

Extra judicial admissions and confessions of a party can not be proved by parol, in a case where testimonial proof is inadmissible.

*Ib.*

The contents of a written promise, or admission can not be proved by parol, until its destruction, or its loss, and proper efforts to recover it, have been shown.

*Succession of Woods, 1002.*

Parol evidence is admissible to prove that a written contract was signed under the influence of force or violence.

*Moore & Coleman vs. Rush, 1157.*

**EVIDENCE—Continued.**

He who contends that he is exonerated from an obligation on which he is sued, must prove the payment, or the fact which has extinguished the obligation. *M. L. Scovel vs. V. M. Gill, 1207.*

The testimony of a party to a suit may be taken under commission, like that of any other witness.

*McLear & Kendall vs. Succession of J. L. Hunsicker, 1225.*

Evidence in proof of a claim is admissible, although it may appear, *prima facie*, that the claim is prescribed.

*Succession of J. W. Zacharie, on Opposition of City of New Orleans et al., 1260.*

The fact that tax-bills have been filed in court is not proof that suit has been brought on them. *Ib.*

The question of simulation when put at issue in any case, will be determined by a review of all the surrounding facts.

*N. Fass vs. Rice Bros. & Co., 1278.*

The husband is incompetent to testify in a suit brought by the wife for a separation of property. *Willis vs. Ward, 1282.*

An order of seizure and sale may issue on a note and mortgage when neither has any United States internal revenue stamps on it. Neither the allegation nor proof of a previous demand for payment, or presentment at a particular place is necessary to obtain executory process, although the note is payable at such a place, when the note is secured by mortgage importing a confession of judgment.

*Pargoud vs. Richardson, 1286.*

Parol evidence is inadmissible to prove a promise to pay the debt of a third person. *Hamilton et al. vs. Hodges et al., 1290.*

The ratification of a contract can only be deduced from facts, when those facts evince clearly, and absolutely, the intention to ratify.

*Ib.*

A bill of exceptions need not be taken to the rulings of the court in civil suits. It is only necessary to note the exceptions in the note of evidence. *Lafayette Fire Insurance Co. vs. Remmers, 1347.*

A party objecting to evidence offered in the court below must see that the objections are stated in the note of evidence; otherwise this court will not consider them. *Ib.*

**EVIDENCE ON APPEAL.**

SEE APPEAL.

**EVIDENCE IN CRIMINAL CASES.**

SEE CRIMINAL LAW.

**EXCEPTIONS.**

SEE PRACTICE AND PLEADING.

**EXECUTION OF JUDGMENTS.**

An adjudication of property under a judgment subsequently annulled by a regular decree of court, conveys no title.

*Billgery vs. Ferguson, 84.*

Where property, within the parish of Orleans, has been seized by the sheriff under a writ of *fi. fa.* and remains in his hands unsold until the return day of the writ, he must, in order thereafter to legally hold the property, and thus maintain on it the lien acquired to the creditor by his seizure, make due return of the writ on its return-day, and cause the clerk of the court to make and give to him a duly certified copy of the writ, within twenty-four hours after the return of the original. Otherwise, the sheriff will be without authority thenceforth to maintain the seizure. *Ib.*

Where the attorney of the plaintiff in execution instructs the sheriff to make a return of *nulla bona*, it relieves the sheriff from the necessity of calling on the plaintiff to point out property of the defendant.

*Pinard vs. George, 384.*

A seizure under *fi. fa.* of property bearing rents includes a seizure of the rents.

*Summers & Brannins vs. Clark, 436.*

When the sheriff makes a return of a writ of *fi. fa.* under which he has seized certain property after the return-day of the writ, and retains a copy of the writ, written by himself, it is not necessary that he should append to the copy his certificate of its correctness, in order to enable him to make a valid sale of the seized property. Under such circumstances, the return of the writ after its return-day will not affect the validity of the sale.

*Briant vs. Hebert, 1127.*

An appellant in whose favor a certain sum of money has been awarded by the judgment of the lower court, may at any moment abandon his appeal, and enforce the judgment appealed from.

*Eliza Snider et al. vs. W. N. Collins, Sheriff, et al., 1236.*

Where two creditors holding the promissory notes of their debtor secured by one mortgage on the latter's plantation, sue on their notes and obtain personal judgments, and each seizes under a *fi. fa.* the crop grown on the plantation, and the proceeds of the crop are held (under an agreement between the seizing creditors which makes no mention of any privilege or pledge on the crop claimed by either creditor) to await the adjudication of their claims under their seizures, the creditor making the first seizure will acquire a preference.

*Edward J. Gay & Co. vs. Francis W. Pike, 1332.*

**EXECUTORS.**

SEE ADMINISTRATORS.

**EXECUTORY PROCEEDINGS.**

SEE SEIZURE AND SALE.

**EXEMPTIONS—FROM TAXATION.**

SEE TAXATION.

**EXEMPTIONS—FROM SEIZURE.**

The exemptions of property from seizure provided for by article 644 of the Code of Practice, and by the acts of 1872 and 1874, do not apply in favor of lessees, as against their lessors.

*Duncan Stewart vs. Charles Lacoume, 157.*

A partnership is not within the language or intendment of the exemption law, and hence none of the property of a partnership is exempt from seizure.

*White & Barret vs. Wm. Heffner, Sheriff, et al., 1280.*

**FACTORS.**

SEE PRINCIPAL AND AGENT.

**FAMILY MEETING.**

SEE SUCCESSION.

**GARNISHMENT AND GARNISHEES.**

Lands situated in another State can not be seized in a garnishment proceeding instituted here.

*George W. Bancker vs. W. Harrington & Co. et al. Temple S. Coons & Co., Intervenors, 136.*

Where a garnishee sets up in his answers, that the judgment debtor's one third interest in the property seized in the garnishee's hands was sold and transferred to a third person before interrogatories were served on him, a subsequent judgment annulling the sale of the seized property as simulated, and fraudulent, will not render the garnishee liable for the whole amount of the judgment creditor's debt, but only for the value of the debtor's interest in the seized property.

*Meyer vs. Deffarge, 548.*

**GIVING IN PAYMENT.**

A fixed price is as essential to the validity of a giving in payment, as it is to a sale.

*Lovell vs. Payne, 511.*

A *dation en paiement* of property unaccompanied by its delivery, is void.

*Queyrouze & Bois vs. Thibodeaux, 1114.*

A *dation en paiement* made by a father to his children, by which he divests himself of all means of support, is void.

*Ib.*

A *dation en paiement* made by a debtor which leaves him nothing with which to pay his other debts, thus making him insolvent, is void.

*Ib.*

**GUARANTY.**

Where the language of a guaranty addressed to a factor is, "I am willing to go his security for the amount of twenty-five hundred dollars," it is not what is termed a *continuing* guaranty. It only embraces the first \$2500 of money advanced, or goods furnished to the person in whose favor the guaranty is given. The factor thus guar-

**GUARANTY**—*Continued.*

anted is legally bound to apply to the guaranteed debt, and for the discharge of the guarantor, the first payments received by him from the person in whose favor the guaranty was given.

*Ben Gerson vs. G. W. & G. M. Hamilton, 737.*

**HABEAS CORPUS.**

The power of this court to issue writs of habeas corpus being confined to cases when we may have appellate jurisdiction, although no appeal be actually pending, it follows that we can not issue such a writ in a case where no fine has been imposed, and the sole proceeding in which the writ is asked is a sentence of the lower court condemning the petitioner to imprisonment for contempt.

*James Wood to the Court, 672.*

**HOMESTEAD.**

Where a necessitous widow dies, without having received her portion of \$1000, under the act of 1852, her *major* heirs can not claim that portion from the husband's succession. Only her children, and her remoter descendants, who are *minors* and necessitous, are entitled to claim such portion.

*Succession of John Durkin, 669.*

Minors under the tutorship of their father do not come within the terms of the homestead act.

*Duncan Greig, Tutor, vs. H. Eastin, Sheriff, et al., 1130.*

Property held in indivision can not be the object of a homestead right.  
*Ib.*

The homestead law of 1865 does not give to the family of a debtor any such rights in his property as will prevent him from making valid confessions of judgment on debts that are prescribed.

*W. C. Martin vs. H. W. Kirkpatrick, Sheriff, et al., 1214.*

Homestead laws exempting property from seizure and sale are wholly inoperative and void as to debts created before the passage of such laws.  
*Ib.*

**HUSBAND AND WIFE.**

A transfer or donation to his wife of furniture, or other property made by an insolvent husband is, *prima facie*, fraudulent and simulated; and such property may be seized by the husband's creditors, and if seized, the burden will be on the wife to prove the real, and the *bona fide* character of the assignment.

*Kirkpatrick vs. Finney & Byrnes et al., 223.*

The validity of a *dation en paiement* made by the husband to the wife, to satisfy a judgment obtained by the wife against him, will not be impaired by the fact that the judgment was a mere consent one, resting on no evidence, when it is shown *aliunde* that the wife's claims, on which the judgment purported to rest, are legal and real;

**HUSBAND AND WIFE—Continued.**

such for example, as claims for her dotal, or paraphernal effects, alienated by the husband.

*Lehman, Abraham & Co. vs. Levy, 745.*

Neither the pecuniary embarrassment, nor the actual insolvency of the husband, is any obstacle to a transfer by the husband to the wife, in good faith, for the replacing of her money, or property, used, or alienated by him. *Ib.*

A judgment of separation of property between husband and wife which is not executed is utterly null and void. *Ib.*

The failure of a wife to execute a judgment of separation of property, which she has obtained, will not impair or prejudice any claim she may have against her husband. *Ib.*

It will be assumed that the property transferred by the husband to the wife, to replace her dotal or paraphernal effects, is fairly appraised in the act of transfer, until the contrary is shown by the party attacking the transfer. *Ib.*

**HYPOTHECARY ACTION.**

The prayer of a petition that the sale of a certain immovable be declared void, and that the property *quoad* the plaintiff's rights be decreed to belong to a certain third person, will not, in the absence of any demand for a seizure and sale of the property, constitute the action an hypothecary one. *Logan vs. Hébert, 727.*

The hypothecary action can not be maintained unless the evidence shows that amicable demand on the debtor for the payment of the hypothecary debt was made in a formal manner, thirty days previous to bringing the suit. *M. L. Kelly vs. G. M. Sandidge et al., 1190.*

The creditor who brings the hypothecary action must declare on oath that the debt is really due him, and that he has demanded payment of his debtor thirty days previous to bringing the suit. *Ib.*

**IMPUTATION OF PAYMENT.**

SEE PAYMENT.

**INJUNCTION.**

A judgment dissolving an injunction bars the plaintiff from obtaining a subsequent injunction, on any of the grounds in existence prior to the judgment of dissolution, and of which he could have availed himself on the trial of the first injunction.

*E. C. Porter vs. Pierre Morère et al., 230.*

Matters that could have been urged by way of defense, on the original trial of a case, and on appeal from the judgment in the case, afford no grounds for enjoining the execution of that judgment.

*John O'Connor et al. vs. Sheriff et al., 441.*

The object of such a suit is not to enjoin the judgment of the district court, but merely to prevent an alleged unauthorized person from

**INJUNCTION—Continued.**

executing it. In a suit like this the dissolution of the injunction might work irreparable injury to the plaintiffs, and other heirs and creditors of the succession, and hence, if properly issued, should not be dissolved on the bond of the defendant; more especially, when the amount of that bond is too small to protect the property of the succession from spoliation and waste.

*Brown vs. Brown, 506.*

The dissolution of an injunction issued to restrain an order of seizure and sale, (in a case where no allegation is made of defect or nullity in the judgment ordering the seizure and sale) leaves nothing more to be decided in the injunction suit, and hence, the court may properly order it to be stricken from the docket.

*Wade vs. Loudon and Sheriff, 660.*

On the trial of motions to dissolve injunctions not issued against money judgments, damages are not to be allowed. The defendants in such injunctions are left to their recourse on the bonds.

*Crescent City Live-Stock Landing and Slaughter-House Company vs. John Larrieux. The Same vs. John Gisch et al., 740.*

It is only where a judgment for money has been enjoined that damages can be awarded on the dissolution of the injunction.

*Morris vs. Bienvenu, 878.*

A defendant in injunction, on complying with the law, may have the injunction set aside in every case where its dissolution will not work irreparable injury to the plaintiff.

*Jefferson and Lake Pontchartrain Railway Co. vs. City of New Orleans, 970.*

Minors will be held in damages only for the actual expenses of a defendant in injunction, caused by a wrongful injunction sued out by their tutor.

*Greig vs. Eastin, 1130.*

Damages will not be granted on the dissolution of an injunction when it is not certain that the plaintiff wilfully used the writ for delay, or merely to harass the creditor.

*Williamson vs. Richardson, 1163.*

One who claims a privilege on certain property has no right, merely on the ground of his having a privilege, to enjoin the foreclosure of a mortgage on the property.

*A. H. Van Loan vs. Wm. Heffner, Sheriff, 1213.*

A judgment debtor against whom a final judgment has been rendered, can not enjoin the execution of the judgment on the ground that the mortgage on which the judgment was based had perempted before the judgment was rendered. As to him, the question of peremption is *res adjudicata*.

*John A. Haynes vs. J. B. O'Neil, Sheriff, et al., 1238.*



**INSOLVENCY.**

The purchaser of property, sold in fraud of his creditors by an insolvent debtor, who pays by anticipation a part of the nominal price after the institution of a suit to annul the sale on the ground of fraud, is not entitled to be refunded the sum he has thus paid.

*Schmidt & Zeigler vs. Caleb Sandel et al.*, 353.

Where an insolvent merchant, pressed by creditors, nominally sells to his penniless clerk a stock of goods which the clerk and he know are not paid for, and accepts in payment of the goods a debt for pretended wages he owes the clerk, and the promissory notes of the clerk, the transaction will be considered a fraudulent simulation.

*Sattler & Co. vs. Leonard Marino*, 355.

A *dation en paiement* made by an insolvent debtor to one of his creditors is fraudulent, and may be set aside. *Lovell vs. Payne*, 511.

The return of a writ of *feri facias* against a party, unsatisfied, is evidence of his insolvency. *Ib.*

Every fraudulent act of a creditor, no matter what its form, may be attacked by any creditor who has been prejudiced by it. *Ib.*

The mere fact that a creditor accepts the voluntary surrender of his debtor will not stop interest from running on his debt, or divest any pledge he may have.

*Mrs. Mary F. Blouin et al. vs. Liquidators of Hart & Hébert*, 714.

A pretended sale by an insolvent debtor to one of his creditors, will be set aside on the petition of any other creditor.

*Johnson vs. Mayer*, 1203.

**INTEREST.**

A judgment can not allow interest that the plaintiff has not claimed.

*Brown vs. Bessou*, 734.

In the absence of a written agreement by the defendant to pay eight per cent per annum interest, only legal interest can be recovered.

*Bayly & Pond vs. Stacey & Poland*, 1210.

Only legal interest will be allowed when a larger interest is not stipulated in writing.

*Buckley vs. Seymour*, 1341.

**INTERVENTIONS.**

SEE PRACTICE AND PLEADING.

**JUDGE AD HOC.**

SEE JUDGES.

**JUDGES.**

A party is not eligible as District Judge who has not practiced law in this State for two years, next preceding his election.

*State ex rel. Fred. Duffel, District Attorney pro tem., et al. vs. Morris Marks*, 97.

JUDGES—*Continued.*

In legal contemplation, a party can not be said to have practiced law, even though, as a matter of fact, he may have done so, if he has not previously qualified to practice, by complying with the requirements prescribed by the constitution.

Because one has acted as district attorney, he can not be said, in a constitutional sense, to have "practiced law." *Ib.*

Where an injunction is asked for in a case that comes within the jurisdiction of the District Court, and the District Judge is absent, and the parish judge is legally recused, the parish judge of an adjoining parish may grant the injunction.

*John A. Klein vs. E. M. Cramer, Sheriff, et al., 372.*

When a parish judge is recused in any case on the ground of personal interest, he can not appoint a lawyer to try the case in his stead.

*Succession of S. M. Hyams, 460.*

The fact that a wife of the judge is one of the parties to the suit is sufficient to recuse him on the ground of personal interest, whether she be separate in property from him or not. *Ib.*

When a judge has acquired his office, in the mode prescribed by the constitution, he has a vested right to its emoluments, during the term fixed by the constitution for its duration, and his right can not be impaired by an act of Legislature, passed during said term, abolishing the office.

*State ex rel. Collens vs. Jumel, Auditor, 861.*

It is not a just ground of complaint that the court below, in charging the jury that they were judges of the law and the evidence, added the words that, "if they thought they knew more of the law than the judge, it was their privilege to so believe."

*State vs. Johnson, 904.*

When the father of the probate judge is a creditor of a succession, and joins the administrator in the petition for a sale of the succession property, the judge may properly recuse himself from passing on the application for an order of sale. In such a case the judge *ad hoc* should sign the order of sale. *Succession of Lacroix, 924.*

The fact that a justice of this court was of counsel for certain parties in two former suits, is no ground for his recusation in a subsequent suit in which the same parties are litigants, when it appears that the validity of none of the proceedings, and the decision of none of the questions involved in the previous suits, are put at issue in the subsequent suit.

*Stewart vs. Mix, Sheriff, 1035.*

A district attorney who is a practicing lawyer, is qualified to act as judge *ad hoc* in the trial of a civil case in which the judge is recused.

*State ex rel. Valery Coce vs. J. A. Chargois, 1102.*

**JUDGES—Continued.**

A lawyer who having accepted the appointment of judge *ad hoc* to try a case, and entered on the trial, afterward refuses to go on with the trial, can not be compelled by mandamus to proceed with the case.  
*Ib.*

**JUDGMENTS.**

A judgment of the lower court which dissolves an injunction, and which passes definitively on all the essential points at issue between the parties, is a final judgment from which an appeal will lie to this court.  
*Bertrand Saloy vs. Amos S. Collins, 63.*

But a judgment is incomplete until signed by the judge who rendered it, and hence, until thus signed, this court can not take cognizance of an appeal from it.  
*Ib.*

The unexplained use of the words "without prejudice," in a judgment dissolving an injunction, will not convert the decree into a mere judgment of nonsuit.  
*Porter vs. Morère et al., 230.*

Until a definitive judgment, rendered by a court of competent jurisdiction, has been set aside, either on appeal or by an action of nullity, money paid under it can not be recovered.

*First Presbyterian Church vs. City of New Orleans, 259.*

The signature of the judge to any final decree rendered by him, is absolutely necessary to constitute it a judgment. Mere entries of judgment on the minutes of a court, unsigned by the judge of the court, are not judgments.

*State ex rel. C. C. Hartwell vs. Allen Jumel, Auditor, 421.*

In order to recover judgment the plaintiff must prove his case. *Ib.*

The decree of the lower court will not be disturbed on the ground of its alleged non-conformity to evidence not submitted to the inspection of this court.  
*Succession of D. P. Jackson, 463.*

An acceptance of service, and waiver of citation authorize a judgment of default to be taken before the expiration of the ordinary ten days delay from the service of citation.

*Evans and Husband vs. Payne & Harrison, 498.*

Consent judgments are not binding on third persons, and therefore any third person sought to be affected by such a judgment, has a right to show its character.  
*Carroll & Co. vs. Hamilton, 520.*

A judgment can have no effect on the rights of those not parties to it, and who had no notice of the legal proceedings which led up to the judgment. Thus a mortgage creditor may proceed in a district court against the mortgaged property, without regard to the fact that the property had been sold under a judgment, to which he was not a party, rendered by a parish court, in a suit brought after the institution of the proceedings in the district court.

*E. J. Barkdull, Tutor, vs. E. F. Herwig and Mrs. C. Smith, 618.*

**JUDGMENTS—Continued.**

If the last of the ten days allowed a defendant for answering falls upon a *dies non*, the whole of the next day is given to him to file his answer; and any judgment of default taken against him before the expiration of that day, is premature.

*John H. Catherwood & Co. vs. Wm. H. Shepard, 677.*

A case will be remanded on the ground of newly discovered evidence filed in this court, whenever it shall appear that the ends of justice demand it. *Wilberga Schneider vs. Etna Life Insurance Co., 1198.*

The reasons given by the court for its judgment in a particular case form no part of the judgment, and hence can not be invoked as *res adjudicata* in a subsequent suit between the same parties.

*Chaffe & Bro. vs. Morgan, 1307.*

**JURISDICTION.**

SEE COURTS.

**JURIES.**

One who has not resided within the parish in which a certain case is tried, for one year next preceding the trial, is not qualified to serve as a juror in that case.

*The State vs. Alonzo Brooks and John Brooks, Sr., 335.*

No legal grand jury for the parish of Orleans nor petit jury for the Superior Criminal Court of said parish could be drawn after April 2, 1878, except from a panel of jurors drawn in accordance with the act of the Legislature passed the said second of April, providing for the drawing of grand and petit jurors.

*State ex rel. Ephraim Maurice vs. Judge of Superior District Court, 603.*

**JUSTICES OF THE PEACE.**

SEE COURTS.

**LAW OF NATIONS.**

So long as a government exercises sway over a territory, and has the physical power and means to enforce obedience, the civil acts of its officers are valid and legally binding. *Sharkey vs. Bankston, 891.*

**LAWS.**

An act of the Legislature which leaves to creditors the ordinary legal remedies for the enforcement of their rights, and merely restrains them in certain cases from employing the summary process of *mandamus*, does not violate the constitutional provision that every injured person shall have adequate remedy by due process of law, and without unreasonable delay.

*State ex rel. Strauss vs. Brown, 78.*

A fine or penalty imposed by a State law, to be exacted by the magistrates of a municipal corporation for the use of the corporation, is not a fine or penalty imposed by the corporation.

*State ex rel. Geale vs. Recorder of the First Recorder's Court, 450.*

**LAWS—Continued.**

The Legislature may constitutionally confer on the officers of a municipal corporation the right to take judicial cognizance of cases arising under the police regulations and laws of the corporation.

*The State and Town of Plaquemines vs. Chas. Ruff, 497.*

An act of the Legislature authorizing a municipal corporation to sue for and recover, before its mayor, a fine for the breach of one of its police regulations, does not authorize the arrest and criminal prosecution of one who commits such a breach. *Ib.*

Where the exemption from taxation fixed by law applies equally, and uniformly to all tax-payers, it can not be said to contravene the constitutional requirement of equality, and uniformity of taxation.

*City of New Orleans vs. Davidson & Hill, 554.*

The law authorizing the judges of certain district courts in the parish of Orleans to appoint commissioners to select competent men to serve as jurors, does not violate any clause of the constitution limiting the courts to the exercise of purely judicial functions.

*State vs. Anderson, 557.*

Under the act regulating elections in this State, enacted in November, 1872, the "consolidated statement of votes made by a supervisor of registration," is not evidence of the result of any election. *Ib.*

Where the repealing clause of a law expressly repeals certain designated sections of the Revised Statutes, and in general terms repeals all laws in conflict with it, it will have the effect of repealing every previous act, identical with any one of those expressly repealed.

*State ex rel. J. H. Rills vs. David N. Barrow, 657.*

All laws are considered promulgated the day after their publication in the State gazette, or in thirty days thereafter, according to locality. The act of the Legislature adopting the "Revised Statutes" of this State, was legally promulgated. *Ib.*

The party who alleges that a law has not been promulgated must prove it. *Ib.*

The Legislature is empowered to form a contract, to pay an annual rent for buildings necessary for the use of the State; and its power to buy a State-House is equally unquestionable, if the debt thereby created does not exceed the constitutional limitation.

*Charles A. Harris vs. Antoine Dubuclet, State Treasurer, 662.*

A legislative act, which, after appropriating a certain sum for a certain legal purpose, payable in annual installments, provides that "out of all State taxes collected, one half of one mill on every dollar shall be set apart of the general funds as a fund to meet" said sum, does not violate the third amendment of the State constitution, devoting the revenues of each year, (except surplus revenues) to the expenses of that year. The effect of such an act is merely to dimin-

LAWS—*Continued.*

ish the general-fund tax by the amount it levies for the purposes contemplated in the statute. *Ib.*

The act of the Legislature imposing an additional license tax on saloon keepers who give singing and dancing entertainments, in conjunction with their occupation of selling liquors, does not violate the constitutional requirement of equality and uniformity of taxation. *State vs. Becker, 682.*

The act of the Legislature passed at the extra session of 1877, abolishing the office of Park Commissioners of the New-Orleans Park, and transferring all of their powers and duties to the Common Council of New Orleans, did not have the effect of extinguishing by confusion any judgment which said commissioners had obtained against the said city, or of relieving the Common Council from providing for its payment, in the manner pointed out by law.

*State ex rel. Carondelet Canal and Navigation Co. vs. Edward Pilsbury, Mayor, et al., 705.*

When there is any conflict between the provisions of the Revised Statutes of 1870, and those of the Civil Code, as revised that year, the latter shall prevail.

*Peet, Yale & Bowling vs. Nalle & Cammack, 949.*

In the interpretation of a law the motive of the lawmaker, and the meaning and scope of the law, may be sought for in contemporaneous history, in the discussions attendant on the progress of the legislation, and in subsequent legislation on the same, or on cognate matters.

*State ex rel. New-Orleans Pacific Railway Co. vs. Nicholls, Governor, 980.*

Until the actual debt of the State has reached the limit of \$15,000,000, it is competent for the Legislature to provide for the issuing of bonds as a loan to such enterprises as fall within its constitutional power, provided that in the act creating the debt, adequate ways and means are provided for the payment of the current interest, and of the principal when it shall become due. *Ib.*

The act of the Legislature of March 11, 1878, authorizing the issue of bonds of the State in aid of the New-Orleans Pacific Railway Company is not repugnant to the constitutional provision prohibiting aid to a private purpose. *Ib.*

The law imposing a smaller license tax on proprietors of bars or drinking saloons, kept on steamboats owned and registered in this State, than on the owners of bars kept on land, does not violate the clause of the constitution prescribing equality, and uniformity of taxation.

*The State vs. Charles Rolle, 991.*

**LAWS—Continued.**

The act 129 of the Legislature of 1877, touching the recusation of judges, is not in conflict with the constitution of the State.

*State ex rel. Schwing vs. Fontelieu, 1122.*

Where the act of the Legislature authorizing a loan of the State's credit on the security of a certain mortgage, is silent as to the question of the appraisement of the property covered by the mortgage, in case of its forced sale, it will be assumed that the Legislature designed that such a forced sale should only take place after the usual appraisement provided for by law.

*State ex rel. New-Orleans Pacific Railroad Co. vs. Nicholls, 1217.*

The act No. 37 of the extra session of the Legislature of 1877, regulating the sale of coal oil, petroleum, etc., prescribing penalties for the infraction of the act, and delegating to the Board of Health the authority to enforce the law, does not violate article 114 or article 118 of the constitution of the State; or that provision of the constitution of the United States giving to Congress the power to regulate commerce between the States; or that provision forbidding any State to lay any impost or export duty except what may be necessary to the execution of its inspection laws. Act No. 37 is an inspection law. *James G. Clark vs. the Board of Health et al., 1351.*

So much of section second of the act No. 41 of 1877 as provides "that all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all proceedings pending therefor, be and they are hereby canceled and annulled," and so much of the first and second sections of said act as exclude certain lands from the limits of the drainage district and exempt them from all future drainage assessments, impair the obligations of existing contracts and are unconstitutional.

*The New-Orleans Canal and Banking Company vs. the City of New Orleans, W. Van Norden, Intervenor, 1371.*

The Legislature can not so alter the charter of a corporation as to affect the rights of third persons previously acquired under the charter.

**LAWYERS.**

*Ib.*

In fixing the compensation for the professional services of a lawyer in any particular case, there are two considerations which will determine the judgment of this court. One is the character and amount of the work done, and the other is the ability of the debtor to pay.

*Breaux, Fenner & Hall vs. Justus Francke, 336.*

**LEGACIES AND LEGATEES.**

Accretion only takes place in favor of legatees, in cases where a legacy has been left to "several conjointly;" as specially provided for in articles 1707, and 1708 of the Civil Code.

*Succession of Dougart, 268.*

LEGACIES AND LEGATEES—*Continued.*

A mere right of usufruct, no matter how general the usufruct, will not constitute the usufructuary a universal legatee, or even a legatee under a universal title; but only a legatee by a particular title.

*Ib.*

It is only when a legatee by a particular title is charged with the payment of a special legacy, that he can profit by the lapse of the legacy.

*Ib.*

When parties, who have been instituted by a last will as universal legatees, or legatees under a universal title, assume the quality of such legatees, they become bound for the debts of the succession, and—saving the case of reduction—for the payment of the particular legacies.

*Esbridge vs. Farrar, 718.*

Heirs and universal legatees are personally bound, in proportion to the share each inherits, to pay the particular legacies. But they are bound only to the extent of the effects of the succession, and hence they may free themselves from paying the legacies by abandoning to the legatees, after the payment of debts, the effects of the succession.

*Ib.*

## LESSOR AND LESSEE.

The lessor's right of pledge can not be impaired by a sale of the property subject to that pledge, collusively made by the lessee to one of his creditors, and removed from the leased premises with the fraudulent intent of defeating the lessor's privilege.

*Worrell vs. Vickers, 202.*

Any doubt as to the intentions of the parties to a contract of lease, arising out of uncertain terms of the contract, will be construed in favor of the lessee. It is the business of the lessor to have the agreement expressed in clear and certain terms.

*E. H. Murrell vs. Mrs. Serena Lion and Husband, 255.*

Where the contract of lease leaves it doubtful whether the lease is to terminate on the first or the thirty-first of a certain month, the lessee may elect which of the two dates it shall end on.

*Ib.*

Where the condition of a contract of lease is that if either party desires to terminate the lease he must give notice of his intent *one month* before the first of the succeeding October, and it happens that the first of the succeeding September falls on Sunday, notice served the second of September will satisfy the condition.

*Ib.*

Where a lessee continues in possession after the expiration of the lease, without a renewal of the contract, there is a tacit reconduction of the lease by the month, terminable on fifteen days' notice.

*Ib.*

Where the lease of a store-house is taken in the *name* of one person, but is really taken, with the full knowledge, and consent of the



**LESSOR AND LESSEE—Continued.**

lessor, for the exclusive use and benefit of a third person, such third person will be deemed the real lessee.

*J. G. E. Aurich vs. Geo. G. Wolf & Levi, 375.*

The property of a party who, to the knowledge and with the consent of the lessor, is the real, although not the nominal lessee, can not be seized under a writ of provisional seizure issued in the suit against the nominal lessee, and directed solely against the property of the nominal lessee. *Ib.*

A judgment creditor who seizes under execution leased property belonging to his debtor, and held by the lessee under a lease *not recorded*, becomes entitled to, and may exact from the lessee all the rents thereafter accruing from said property; and the fact that the lessee has executed and delivered to the debtor his negotiable promissory notes covering the rent to become due for the whole of the unexpired term of the lease, will not exonerate him from liability to the seizing creditor, for the rents accruing subsequent to the seizure.

*Summers & Brannin vs. James S. Clark, S. L. Boyd, Garnishee, 436.*

Where the former lessee of property is sued by his former lessor, for damages to the property alleged to have been caused by the fault of the defendant during the term of the lease, the defendant may contest the former lessor's title to the property; and to recover in such a suit, the plaintiff must prove that he was the owner of the property. *Ophelia G. Burbank, Tutrix, vs. William Harris, 487.*

**LIBEL.**

A stipulation made by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made.

*L. C. Perret vs. Alice King, 1363.*

**LICENSES.**

SEE TAXATION.

**LITIGIOUS RIGHTS—PURCHASE OF.**

One who purchases a claim which he knows to be in suit, and legally contested, is entitled to recover on it only what he paid for it, with legal interest from the date of its transfer to him.

*Ann L. Spears vs. W. L. Jackson, Administrator, 523.*

**LOUISIANA LEVEE COMPANY.**

Under the acts of the Legislature which set forth the terms of the contract made by the State with the Louisiana Levee Company, the company are bound to construct, or repair, or strengthen in any given year only such levees, as the commission of engineers, created

LOUISIANA LEVEE COMPANY—*Continued.*

by those acts, shall require, and furnish estimates of the work of, before the first of October of the preceding year : and to maintain every *completed* section of the levee, up to the standard dimensions prescribed by the commission of engineers. One who claims damages of the company therefore, for injury caused by a crevasse at any given point on the levee, must, in order to set forth a *prima facie* cause of action, allege that the company failed to build, or repair the levee at the crevasse point after having been directed by the engineers to do it, or, had not done the work according to the standard fixed by the engineers; or, that the crevasse had occurred at some point on a completed section of the levee, where the standard dimensions prescribed by the engineers had not been maintained by the company; or, that on account of the imperfection of the work, the crevasse occurred when the water was below the standard height fixed by the engineers.

*Choppin & Beard vs. Louisiana Levee Company. 345.*

## MANDAMUS.

A mandamus will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that the performance of that duty by him is a physical impossibility; or that his ability to carry out the mandate of the court depends on the co-operative action of a third person who is not before the court.

*State ex rel. Pierre Lacaze et al. vs. Chas. Cavanac, Administrator of Commerce, 237.*

The prayer for a mandamus is too vague which merely asks that an officer shall be compelled to accomplish a certain result. The relator must designate the specific acts which he demands that the respondent shall do. *Ib.*

The holder of a claim against the State, the amount of which is fixed by law, may compel the Auditor by mandamus to warrant for the amount, unless the latter shows that no appropriation was made for its payment, or that the appropriation was exhausted, or that the claim exceeded the revenue of the year in which it was exigible.

*State ex rel. Samuel vs. Jumel, 339.*

It is the duty of the treasurer of the parish to register and he may be mandamusd to register the claims of the sheriff for all expenses incurred by him on account of the arrest, confinement, and maintenance of persons accused of crime, and for all expenses whatever attending criminal proceedings, when the amount of such claims shall have been certified to as correct by the clerk of the court and the presiding judge thereof, and presented to the treasurer for registry within sixty days thereafter. But the treasurer is not bound to register claims for services, or expenses not rendered, or

**MANDAMUS—Continued.**

incurred in criminal proceedings, not even if certified to as correct by the clerk and presiding judge.

*State ex rel. Barrow, Sheriff, vs. Fisher, Treasurer, 514.*

SEE STATE EX REL. CARONDELET C. & N. CO. VS. CITY OF N. O., 705.

One who has a claim against the State for a salary, or for money due on other accounts, is entitled to have his right to payment adjudicated by means of a mandamus against the auditing officer.

*State ex rel. T. Wharton Collens vs. Allen Jumel, Auditor, 861.*

It is discretionary with the Attorney General of the State to proceed, on his own motion, to bring suit for the forfeiture of the charter of a corporation, and hence he can not be compelled by mandamus to institute such a suit.

*State ex rel. Lannes vs. Attorney General, 954.*

A mandamus will not issue to compel the parish assessor, and tax collector to assess a tax. Only the police jury of a parish have power to levy a tax.

*State ex rel. Nelson vs. Fournet, 1103.*

Although it is proper that proceedings for a mandamus should be taken in the name of the State, yet the absence of that form will not be fatal, when the facts set forth in the petition disclose a right to the writ, and there was a proper prayer for it.

*J. A. & E. A. Morris vs. J. W. Womble, Sheriff, 1312.*

**MANDATE.**

SEE PRINCIPAL AND AGENT.

**MARRIAGE.**

Their own public and expressed consent, and the consent of their master, were alone sufficient to give validity to a marriage between slaves in Louisiana, and from the moment of their emancipation such a marriage has secured to them and their posterity all the rights and privileges bestowed by the State on marriages authorized and sanctioned by its laws.

*Succession of Henry Pearce, 1168.*

Where a man introduces a woman to his friends as his wife, calls her his wife, and he and she live together publicly as man and wife until her death, and their children, born while they are thus living together, are baptized, reared and educated as their legal offspring, the law will presume that they had been lawfully married, and that their children are legitimate, until it is shown that no marriage between them ever took place, or that it was void on account of some nullity established by law.

*Blasini vs. Succession of Blasini, 1388.*

**MARRIED WOMEN.**

Property purchased during marriage by the wife, in her own name, with her separate money, which she has always kept, the administration

**MARRIED WOMEN—Continued.**

of which has never been under the husband's control, is her paraphernal property, and can not be seized by any of the husband's creditors.

*Succession of H. Pinard vs. Peter Hollen et al., on Opposition of Mrs. Hollen, 167.*

The omission to state in the act of sale to a wife, of property bought by her during marriage, that it was bought with her paraphernal funds does not prejudice her title or increase the burden of proof which the law imposes on her in the vindication of her title. *Ib.*

Profits derived during marriage from the use of paraphernal funds under the control of the wife, are paraphernal. *Ib.*

A wife is sufficiently authorized to take an appeal when her husband joins her in the petition for it.

*Boutté et al. vs. Executors of Boutté, 177.*

The mortgage note of a wife knowingly received by a creditor of the husband, in satisfaction, or security of the husband's debt, is, in the hands of such a creditor, utterly null and void.

*Claverie vs. Gerodias, 291.*

A wife, although separate in property, can not be held on her mortgage note, when the holder of the note fails to show that she was authorized by the judge to make the mortgage, and fails to show that her pretended agent, who made the mortgage was empowered by her to do it, and also fails to show that the consideration of the note inured to her separate benefit. *Nugent vs. Stark, 492.*

The declaration made by a wife and her husband in a written contract that a certain plantation was her property, is not invalidated by the fact that she was a married woman.

*Mrs. Caroline Forrester et al. vs. Moses Mann, 542.*

Contracts made by a married woman personally, or by her authorized agent, for supplies and overseer's wages for the benefit of her separate plantation are, if recorded, binding on the crops grown on the plantation that year. *Ib.*

A wife separate in property from her husband, who is insolvent, is liable, not merely for supplies furnished to her, either in person or to her son or husband, and on her exclusive credit, for the use of her plantation, but also for household expenses, and those for the education of her children. But she is not liable for her husband's debts, or for items of indebtedness not contracted by her, and which neither inured to her benefit, nor were legitimate household expenses. *Acquilla McElvin vs. Mrs. Elizabeth M. Taylor et al., 552.*

A married woman will not be bound by her mortgage note executed by her authorized agent, when it appears that she was not authorized by the judge of her domicile to empower the agent to execute such

**MARRIED WOMEN—Continued.**

a note, unless the holder of the note shows affirmatively that the consideration of the note inured to her separate benefit.

*M. M. Ada Calhoun vs. Mechanics' and Traders' Bank, 772.*

To maintain a proceeding *via executiva* against the property of a married woman, in virtue of a mortgage executed by her agent, either the act of the judge authorizing her to so empower the agent, or her ratification of the agent's act after she became a widow, or the fact that the debt inured to her separate benefit, must appear in evidence in the form of an authentic act, or of a judgment of some competent court. *Ib.*

A parish judge has no power to authorize a married woman to contract a debt for more than \$500.

*Mary Stuffer vs. Eliza J. Puckett, 811.*

Where the wife has not been judicially authorized to give a mortgage on her separate property, a note and mortgage executed by her are not legal proof of her obligation, and evidence *aliunde* showing that it was her separate debt, must be produced in order to bind her. *Ib.*

Unless the wife accepts the community expressly, or tacitly, she stands in relation to its debts as she does toward the debts of third persons. *Ib.*

Even in cases where a married woman has executed her note and mortgage on her property to secure it, under the authorization of the judge, she may prove by parol evidence that the note and mortgage were obtained by fraud, and that their consideration was a debt of her husband. *Henry Barth vs. Mrs. Louisa Kasa, 940.*

The proceeds arising from the sale of property belonging to the wife, collected by the administrator of the deceased husband, belong exclusively to her, and do not enter into the husband's succession.

*Succession of Quin, 947.*

A married woman may enjoin the execution of a judgment against her, when the ground of the judgment was a debt of her husband, even though she failed to set up that defense in the suit in which judgment was obtained. *Bowman vs. Kaufman, 1021.*

The failure on the part of a wife to prosecute an appeal she had taken from a judgment against her on account of her husband's debt, will not estop her from subsequently contesting the legality of the judgment. *Ib.*

A married woman, even though separate in property, can not be held liable for a debt contracted by her husband, unless it be affirmatively shown that it inured to her separate benefit. *Ib.*

Where a wife, authorized and assisted by her husband, purchases property in her own name, and the same is ever afterward given in to the tax collectors by her and her husband as *her* property, and the

**MARRIED WOMEN—Continued.**

husband authorizes and assists her to execute a mortgage on the property, as *her* property, to secure a separate debt of hers, the husband is thereby estopped from setting up any title to the property, to the prejudice of a judgment creditor of the wife.

*C. S. Stewart vs. F. P. Mix, Sheriff, et al., 1036.*

Neither the wife nor her separate property can be held liable for supplies furnished to her husband for the cultivation of her plantation, unless it be proved that the wife herself cultivated her plantation, or that it was cultivated for her account and benefit. The mere fact that the creditor kept the account for the supplies against the husband as agent of the wife, does not prove the agency.

*Van Wickle vs. Violet and Wife, 1106.*

A wife, even separate in property, is incapable of either buying or selling property, unless her husband concurs in the act, or yields his consent in writing.

*Edward Foreman vs. W. G. Saxon et al., 1117.*

A married woman duly authorized but not coerced by her husband, who executes a mortgage on her property to secure the payment of her own debt, is bound by the mortgage.

*Moore & Coleman vs. Mary F. Rush, 1157.*

A married woman is not estopped from disproving the averments of an authentic act executed by her, and which she alleges she was forced to sign.

*Ib.*

Under the charter of the Citizens' Bank of Louisiana married women may become stockholders, and as such may lawfully mortgage their property, and bind themselves jointly and *in solido* with their husbands. And they may validly renounce their rights on their husbands' property in favor of the bank, when their husbands own its stock.

*Gillaspie vs. Citizens' Bank of Louisiana, 1315.*

**MARITAL FOURTH.**

SEE WIDOWS.

**MASTERS OF VESSELS.**

The commander of a steamboat has a right to use whatever reasonable and lawful force may be necessary to maintain a proper police of his vessel, and discipline among his employees.

*Mary Johns vs. Henry J. Brinker, 241.*

Where an employee on board of a steamboat, by her own insolence, insubordination, and threats of personal violence, provokes the captain of the boat into an assault with his hands, resulting in but a trifling injury to her, she will not be entitled to recover in damages.

*Ib.*

**MECHANIC'S LIEN.**

SEE PRIVILEGE.

**MINORS.**

SEE TUTORS.

**MORTGAGES.**

No mortgage has any effect as to third persons unless recorded; and save in the single case of the minor's mortgage on the property of the tutor, *every* mortgage ceases to have effect, except as to the parties to it, unless re-inscribed in ten years from the date of its original inscription. Neither the existence of the pact *de non alienando* in a mortgage, nor the pendency of a suit to enforce the mortgage obviates the necessity of its inscription, or its re-inscription.

*Watson vs. Bondurant, 2.*

A mortgage primarily without any consideration given to secure certain negotiable notes in the hands of any future holder, becomes a valid mortgage in favor of any innocent third person who may acquire one of the notes before its maturity, and for value.

*Billjery vs. Ferguson, 84.*

The legal mortgage on a person's property resulting from the registry of his official bond as sheriff, is extinguished by prescription, unless re-inscribed within ten years from the date of said registry. The necessity of a re-inscription every ten years, applies to *all* mortgages, except those specifically exempted from that necessity.

*Succession of W. D. Gale. On Opposition of Wm. Sadler, 351.*

The clause in an act of mortgage fixing the fees of the creditor's attorney at five per cent in the event of the non-payment of the debt at its maturity, makes the debtor, on the happening of that event, absolutely liable for that amount; and this liability can not be affected by the fact that the creditor has not really paid, or obligated himself to pay that amount of attorney's fees.

*Renshaw vs. Richards, 398.*

The nullity of the principal debt annuls the mortgage securing it.

*Chatenond vs. Hebert, 404.*

Before a mortgage created by an alleged agent can be enforced, it must be proved that the alleged agent was specially authorized to make the mortgage.

*Mrs. Alpha P. Nugent vs. Mrs. Dora L. Stark et al., 492.*

A mortgagee who transfers part of the mortgage debt to another, can not compete with his transferee for the proceeds of the mortgaged property, where the amount is not sufficient to satisfy both.

*Barkdull vs. Herwig and Smith, 618.*

The registry of a judgment against a party will operate as a legal mortgage on all the immovables of that party situate within the parish wherein the judgment is registered, whether the deed to such immovables is recorded or not; and such mortgage is good against every body that the judgment debtor's title to the immovables is good against.

*Logan vs. Hebert, 727.*

**MORTGAGES—Continued.**

The owner and mortgagor of property sold for taxes, can not buy it in, and thus acquire a title to the prejudice of the mortgagee.

*Renshaw vs. Stafford, 853.*

The mortgagee's rights on the property will remain in full force.

*Ib.*

The setting aside, for any cause, of the sale of an immovable made by a debtor to his creditor who had a mortgage on the immovable, will not impair any legal rights on the property which the creditor had in virtue of his mortgage.

*Chaffe & Bro. vs. Morgan, 1307.*

Inscriptions of mortgage can only be erased by the consent of the parties to the mortgage, or by the effect of a decree to which the mortgagee is a party.

*Ib.*

**NULLITY OF JUDGMENTS.**

No valid judgment can be given in a proceeding wherein no citation issued to, and no answer, or appearance was made by the defendant.

*Woolfolk vs. Woolfolk, 139.*

A judgment rendered against a party who was not cited, and who has not put in an appearance, is null and void.

*Victor Laurent vs. A. J. Beelman and F. M. Beelman, 363.*

A final judgment on default, signed by the judge *in chambers*, is absolutely void. Such a judgment, to be valid, must be read, and signed, in open court.

*Ib.*

**NULLITY OF SALES.**

Where the property of a succession is sold by a mortgage creditor under executory process, without making the succession a party to the proceedings, and no fraud is shown, and it appears that the money was applied to the debts of the succession, the heirs can not annul the sale, and recover the property, without tendering to the innocent purchaser of the same, the price he had paid for it.

*Edmund Brown vs. Emile Bouny et al., 174.*

Even when it is shown that the expressed consideration of a transfer does not exist, the contract can not on that account be invalidated, if the transferee proves that there was another legal, and sufficient consideration.

*Brown, Administrator, vs. Brown, 966.*

**OBLIGATIONS.**

A party can not be held liable for the value of property, stolen on account of its being exposed to theft by an act of his which he had the legal right to do.

*Geltwerth vs. Hedden, 30.*

A creditor holding the mortgage note of a third person as collateral security, is compelled to credit the debt due him with only the net sum he was legally able to collect on said notes.

*Blouin vs. Liquidators of Hart & Hebert, 714.*



**OBLIGATIONS—Continued.**

When neither error nor fraud is alleged by parties, they can not be relieved from the legal effects of their own acts, and declarations.

*Eskridge vs. Farrar, 718.*

**OFFICERS.**

Where an act of the Legislature makes a new law for the assessment of property, and a new Board of Assessors are appointed under that law, whose pay is conditioned on their doing the work of assessment, and they actually do the work *they* will be entitled to the appropriation made for the compensation of such assessors, and not any previous Board of Assessors who were *functi officio* when the work of assessment was done.

*State ex rel. Geo. E. Paris vs. Allen Jumel, Auditor, etc. E. C. Payne et al., Intervenor, 235.*

The mere failure of a party who has been elected to a constitutional office to qualify within thirty days from the date of his commission, can not be construed into an abandonment of the office.

*State ex rel. Sam Lisso vs. W. P. Peck, 280.*

The failure of a district attorney *pro tem.*, who has been elected by the police jury of his parish, to qualify within the legal delay, creates a vacancy, which can only be legally filled by appointment of the Governor.

*State ex rel. Rills vs. Barrow, 657.*

The Auditor can not be compelled to warrant on the Treasurer in favor of any officer of the State, for any sum beyond the appropriation made by the Legislature for such officer.

*State ex rel. Collens vs. Jumel, Auditor, 861.*

When an act of the Legislature, creating an office, takes effect from its passage, the term of the office will commence to run from the passage of the act, in the absence of any provision in the act to the contrary. *The State ex rel. Daniel Wilson vs. E. T. Parker, 1182.*

**OFFICES—AND VACANCIES IN.**

SEE OFFICERS.

**PARAPHERNAL PROPERTY.**

SEE MARRIED WOMEN.

**PARISH OBLIGATIONS, AND POWERS OF POLICE JURIES.**

Where an act of the Legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish shall prescribe, the police jury must specially authorize the issue of the bonds, and the bonds must be signed by persons designated by the Legislature; and in default of this action of the police jury and this signature of the bonds, all bonds issued under color of said legislative act are invalid.

*State ex rel. E. Rabasse vs. Police Jury of Terrebonne Parish, 287.*

**PARISH OBLIGATIONS, ETC.—Continued.**

When a law directs that certain bonds of a parish shall be signed by a majority of the members of its police jury, it means a majority of the members designated by the jury. It does not mean any majority of its members, not selected for the purpose by the jury. *Ib.*

The police jury of a parish have no power to issue its warrants, or paper of any kind, negotiable or otherwise, for any purpose, unless specifically authorized to do it by the Legislature, and the means of paying the debt are provided for in the ordinance creating it.

*J. P. Smith vs. the Parish of Madison, 451.*

Neither the registry by the treasurer of an account against the parish, nor its indorsement by him under the statute, amounts to the issuance of scrip, or negotiable obligations of the parish.

*State ex rel. Barrow, Sheriff, vs. Fisher, Treasurer, 514.*

The fact that no money is in the parish treasury when a proper claim for registry is presented to the treasurer is no reason why the claim should not be registered. *Ib.*

An ordinance of a police jury, passed prior to April 20, 1877, imposing a parish tax of over four mills on the dollar for general parochial purposes, and not afterward sanctioned by the vote of a majority of the taxpayers of the parish, is illegal.

*Gonzales vs. Lindsay, 1085.*

The ordinance of a police jury imposing a fine on persons between certain ages for falling, or refusing to work on the public roads, is constitutional.

*Parish of St. Martin ex rel. Baker vs. Delahoussaye, 1092.*

Property situated within an incorporated town, and the inhabitants of the town, are subject to the imposition of property and license taxes by the police jury of the parish, unless specially exempted by some act of the Legislature. *Parish of Iberia vs. R. A. Chiapella, 1143.*

Before a parish can recover the amount of a tax imposed by its police jury, it must show that an estimate of the parish expenses for the current year was made, and published at least thirty days before the assessment of the tax. *Parish of Lincoln vs. Huey, 1244.*

The police jury of a parish have authority to impose any license tax they may see fit to impose on trading boats trading within the parish. *Parish of Plaquemines vs. John Bowman, 1403.*

**PARTITION WALLS.**

Where the owner of a vacant lot in the city of New Orleans, who desires to erect a building of certain dimensions on the lot, finds that the wall of his neighbor's house, which is built up to the boundary line of the lot, is so thin that the weight of his prospective building, although erected within the bounds of his own lot, would destroy his neighbor's house, he has the legal right to take down the neigh-

**PARTITION WALLS.**—*Continued.*

boring wall, and replace it by one strong enough to support the building he shall erect. Such reasonable care must be observed by him however, as will render the inconvenience and loss to his neighbor as small as practicable; and his care must be proportioned to the risk of loss and inconvenience to his neighbor that his undertaking may occasion; and he is liable for whatever actual damage his neglect to take such care may entail.

*George L. Gettwerth vs. Mrs. E. Hedden, 30.*

**PARTITION.**

The immovable property of a succession, even though partly owned by minors, may be sold for less than its appraised value, to effect a partition among co-heirs, or co-proprietors.

*Ventress vs. Brown, 1012.*

**PARTNERSHIP.**

The assignment of its assets for the benefit of its creditors, made by a defunct partnership to an individual member of a new partnership succeeding to the former business of the old concern, will not make the new partnership liable to the defunct partnership for the value of any of its assets, and therefore not amenable to a garnishment at the suit of any creditor of the defunct concern.

*Bancker vs. Harrington & Co. et al., 136.*

The mere fact that one member of an ordinary, planting partnership is entrusted with the management of the plantation, will not authorize him to make a *dation* in payment of certain property of the partnership to one of the partnership creditors, and thus place the interest of his copartner, in said property, beyond the reach of other creditors of the partnership.

*Alfred S. Bass vs. Wm. R. Messick, Sheriff, et al., Alcus Scherck & Autey, Interveners, 373.*

Where the evidence shows that the two individual signers of a merely joint note were, at the date of the note, commercial partners, and that the consideration of the note was money borrowed for, and used by the partnership, each of the makers will be liable on the note *in solido*.

*Mitchell vs. D'Armond, 396.*

Where a non-resident commercial firm make an agreement with two resident firms, in virtue of which agreement one of the resident firms is to purchase certain merchandise, and ship it in the name of the other, and the other resident firm, with the money of the non-resident firm, is to pay for the merchandise, and each of the resident firms agree to receive, instead of fixed sums in payment of their services, certain proportions of the profits to arise from the subsequent sales of the merchandise, and also agree to share in any losses resulting from said sales,

**Held:** That such an agreement will not make the said firms commercial

**PARTNERSHIP—Continued.**

partners, even as to third persons, when it appears that they did not *intend* to form a partnership, and that they have not held themselves out to the world as partners.

*Chaffraix & Agar vs. John B. Lafitte & Co.*, 631.

No valid judgment can be rendered against any of the individual members of a former commercial partnership, who have not been cited, on the confession of an agent of the former firm, made after the dissolution of the firm. Such a judgment is null and void.

*Edward Conery vs. Rotchford, Brown & Co.*, 692.

When one partner sues the other for a liquidation and balance due on partnership account, the defendant can not set up in reconvention, damages to the business of the partnership caused by the bad habits of the plaintiff.

*Mills vs. Fellows*, 824.

In the absence of express agreement a charge by one member of an ordinary partnership against the other, for keeping *the books of the firm* is inadmissible.

*Ib.*

The individual members of a commercial firm may execute a valid note, and a valid mortgage securing said note on their individual property, in favor of the firm, and any third person acquiring the note from the firm, in good faith, for value, and before maturity, may enforce its payment.

*Pike, Brother & Co. vs. Hart & Hébert*, 868.

Where a loan is made by two members of a commercial firm, in a matter foreign to the business of the firm, and in disregard of the express opposition of the third member, the two members making the loan are justly chargeable with its amount.

*David G. Cooke vs. Hugh and Andrew Allison*, 963.

A promissory note executed in the name of a certain commercial firm, in liquidation, by an agent of one of the former partners, after the dissolution of the firm, is not binding on the former members who have not given any specific authority for the execution of the note.

*Dodd, Brown & Co. vs. John Bishop & Co. et al.*, 1178.

Where a creditor of a former commercial firm sues its individual members for goods sold to the firm, and declares in his petition on the itemized account of the goods, and also on a promissory note of the firm, given in liquidation of the account by one not authorized to sign for the firm, he will be entitled to recover for the goods, on the unopposed proof of their sale and delivery.

*Ib.*

One who acts in such a manner as to induce others to believe that he is a member of a certain partnership, makes himself liable to them as a partner.

*Ib.*

An ordinary partnership can not be held liable for the individual debt of one of its members because of an agreement to that effect between

**PARTNERSHIP**—*Continued.*

that member and his creditor, unless it be proved that the member was authorized to make the agreement by his copartners, or that his agreement was ratified by them, or that the partnership was benefited by the transaction.

*W. E. Hamillon et al. vs. Nellie Hodges, Tutrix, et al., 1290.*

**PAYMENT.**

Payments made by a debtor without special instructions as to their imputation, will be imputed in accordance with the tacit agreement of the parties as disclosed by their dealings and correspondence.

*McLear & Kendall vs. Succession of Hunsicker, 1225.*

A debtor who receives, without objection, an account current from his creditor which imputes payments made by him to the less onerous part of his debt, is held to ratify by his silence the imputation of payment made in the account. *Ib.*

Where the debts are of like nature the imputation of payments is made to the debt longest due. *Bloom & Co. vs. Kern, 1263.*

**PLEDGE.**

There can be no valid pledge of a mortgage, or vendor's privilege, by mere agreement of parties to that effect, unaccompanied by an actual or symbolical delivery of possession.

*Sevin & Gourdain, in Liquidation, vs. Théogène Caillouet, 528.*

The fact that the stock of a corporation is only transferable on the books of the company, does not prevent a stockholder from validly *pledging* his stock, by merely delivering to his creditor the *certificates* of his stock. A transfer of the stock on the books is not necessary to perfect the pledge. *Blouin vs. Liquidators of Hart & Hebert, 714.*

A consignee who has made advances on cotton shipped to him has a right of pledge on it, and its proceeds, for the re-imbusement of those advances; and until the debt due for those advances is paid he is not bound to accept, or pay any drafts drawn on him by the consignor against said cotton at, or about the time it was shipped, in favor of a third person who had discounted the drafts for the consignor, and thus enabled the latter to buy the cotton shipped to the consignee. *Thos. E. Helm et al. vs. Meyer, Weis & Co., 943.*

It is not necessary to record a pledge to make it effective as to third persons, where the object of pledge comes into the actual possession of the pledgee before any conflicting lien has attached to it. *Ib.*

Where the pledgee of a mortgage note, in whose hands it has been placed to secure a debt due him by the pledgor, sells the property mortgaged to secure the note for a sum less than the amount of the note, and immediately resells it for a larger sum than that of the note, he becomes liable to the pledgor, not for the price at which the property was resold, but merely for the amount of the note. *Mrs. A. R. Richardson vs. Moses Mann, 1060.*

## POLICE JURY.

SEE PARISH OBLIGATIONS, AND POWERS.

## PRACTICE AND PLEADING.

To confirm a judgment by default, involving the assessment of damages, a jury is necessary. *Watson vs. Bondurant, 1.*

Any former member of a dissolved commercial firm may be brought into court by a firm creditor and condemned for a social debt, contracted while he was a member, on a citation addressed to the *firm*, but served personally on him; when the citation is accompanied by a certified copy of the petition, in which the creditor prays for a judgment against *each* former member of the firm *in solido*.

*J. H. Montague et al. vs. Weil & Bro., 50.*

The right to an office will not be considered on any rule taken in this court.

*Police Jury of the Parish of Plaquemines vs. James Foulhouze et al., 64.*

If one of the parties to an appeal dies, pending the appeal, a valid judgment may be rendered against his succession by making his administrator a party to the suit, and prosecuting it to a judgment contradictorily with the administrator.

*Anderson vs. Arnette et al., 72.*

An act of sale which contains the stipulation of a real price, no matter how fraudulent the sale may be, can not be disregarded, and assailed collaterally, like a simulated sale.

*Billgery vs. Ferguson, 84.*

Heirs of age who are in possession of the property of a succession, and minor heirs in possession of it by virtue of its being under the control and administration of their natural tutor, may be sued by any creditor of the succession, in a court of ordinary jurisdiction.

*Soye vs. Price et al., 93.*

No intervention can be filed in a suit for a partition, after judgment decreeing the partition has been rendered. That judgment is definitive, and hence the suit can not be considered as pending until the final decree homologating the partition.

*Woolfolk vs. Woolfolk, 139.*

Parties who intervene in a partition suit can not be considered as third opponents to the execution of the judgment in the suit, unless they either claim to be owners of the property on which the judgment is sought to be executed, or claim a preference on the proceeds of its sale.

*Ib.*

A suit for the nullity of a judgment can not be brought by way of intervention, or third opposition. It must be brought in the ordinary form, by petition and citation.

*Ib.*

No peremptory exception filed in this court will be noticed, unless filed

**PRACTICE AND PLEADING—Continued.**

while the trial of the case is still pending. It is too late to file such an exception after the case is submitted.

*James J. O'Hara vs. City of New Orleans, 152.*

When the plea of prescription is filed in a suit, not as an answer, but as a peremptory exception, it will not have the effect of setting aside a judgment of default previously rendered in the suit; and on the overruling of the exception, thus filed, the plaintiff is entitled to introduce his proof to confirm his default, and to compel the judge *a quo* to hear his proof and pass on his application to confirm.

*State ex rel. E. Borland, Jr., vs. the Judge of the Second Judicial District, 155.*

An agent, or depository, in whose hands certain property attached in a suit has been placed for keeping and sale, by the parties claiming adverse rights in the same, can not be compelled by the attaching creditor, on a mere *rule*, to deliver said property, or proceeds of the same, to the sheriff. No action can be had against the depository in such a case by the attaching creditor until his rights have been fixed by a decree rendered contradictorily with all other parties asserting an interest in the property.

*Thomas J. Meshew vs. S. F. Gould, 163.*

In a possessory action the plaintiff's title to the property in contest is put at issue, and therefore its validity may be judicially inquired into.

*Louis Fix vs. Succession of Mrs. W. H. Dierker, 175.*

To maintain a suit for partition, the heir who brings the suit must make each one of his co-heirs a party to the proceeding. Every person interested, must be made parties to the suit.

*Boutté et al. vs. Executors of Boutté, 177.*

Redundancies in pleading will, on motion to that effect, be stricken out.

*Charles F. Bevens vs. Meyer Weill et al., 185.*

Before a judgment creditor, having a privilege on certain immovable property which has been really sold by his debtor to a third person, can seize and subject that property to his judgment, he must first bring a revocatory action and have the sale of the property annulled.

*Ib.*

A mortgage creditor of a succession, whose debt has not been novated, having failed to take any action in a court of ordinary jurisdiction to foreclose his mortgage, can not ask for the revocation of an order of sale of the mortgaged property, granted by the probate court on the prayer of the administratrix, on the ground that the property no longer belonged to the succession, but belonged to a third person, who, in purchasing the property from the decedent, had assumed to pay his, (the creditor's) debt.

*Succession of L. H. Tabarry, 187.*

PRACTICE AND PLEADING—*Continued.*

One who has tacitly allowed a judgment to be rendered against him, can not assail it collaterally, on a rule taken by a third person to carry the judgment into effect. He must proceed by a direct action to annul.

*State ex rel. Elder vs. Judge of Third District Court et al.*, 229.

The execution of a judgment can be arrested in but two ways, by a suspensive appeal, and by injunction. *Ib.*

The appropriate process to arrest an order of sale, rendered on a rule to show cause why property should not be sold is the process of injunction, not appeal.

*State ex rel. McCloskey et al. vs. Judge of Second District Court*, 233.

Neither the legatee of an annuity in a succession, nor the residuary legatee, has a right to frustrate or retard the sale of property prayed for by particular legatees for the payment of their legacies. *Ib.*

A general plea of "prescription," without indicating what specific prescription the party invokes, and relies on, is too vague for this court to take cognizance of.

*Widow Sarah Gaines vs. Succession of Martinez Del Campo*, 245.

The validity of a garnishee's title to property in his possession, of which he claims the ownership, can not be passed on in a rule, taken to traverse the answers of the garnishee. Such an issue can only be passed on in a direct suit brought to test the sufficiency of the title.

*Martin Ivens, Jr., vs. E. M. Ivens & Co. C. S. Johnson, Garnishee*, 249.

The question whether an executrix has been legally appointed can not be raised collaterally, on an opposition to her account. It can only be considered in a direct action to revoke.

*Succession of Baptiste Dougart. Opposition to the Account of Executrix*, 268.

A general denial, in an opposition to the account of an executrix, puts at issue each and every item in the account, and puts on her the *onus* of proving each item. *Ib.*

The object of the rule *nisi* in a mandamus proceeding is not to ascertain whether the court erred in granting the rule, but whether the mandamus should be made peremptory. And hence it is to the latter inquiry alone that the respondent should address himself.

*State ex rel. C. C. Durand et al. vs. Parish Judge of St. Martin Parish*, 282.

A party having occasion to apply for mandamus in two suits, before the same judge, may state his causes of complaint, with respect to both, in a single petition. *Ib.*



**PRACTICE AND PLEADING—Continued.**

Where an application for a writ of injunction, filed in conjunction with an opposition to a seizure and sale, is referred to the merits, and no restraining order was issued until after a hearing on the merits, it is immaterial whether the affidavit for the injunction was legally sufficient, or not.

*Jean Clavier vs. L. A. Gerodias and Her Husband, 291.*

A defendant who pleads certain exceptions to the suit against him, is, so far as the exceptions are concerned, a plaintiff, and hence must prove the exceptions.

*R. R. Barrow vs. Jules Lapene, John B. Pitman, Intervenor, 310.*

Thus, when the purchaser of property at a tax-sale, who is sued by the former owner for the recovery of the property, excepts, that the plaintiff must re-imburse him what he has paid for the property, and which inured to the benefit of the plaintiff, before the latter can demand the recovery of the property, such a purchaser must in order to maintain his exception show the precise amount that he is entitled to be re-imbursed. *Ib.*

One who sues for the nullity of a judicial sale, can not ask for the proceeds of the sale. The two demands are inconsistent, and mutually exclusive. In such a case the suit to annul will be dismissed.

*Michael Dowling, Curator, vs Hypolite Gally, 328.*

The purchaser of property at a judicial sale, is a necessary party to a suit brought to annul the sale. *Ib.*

The only legal methods of arresting a sale under executory process, or the proceeds of such a sale, are by appeal, by injunction and bond, and, (in certain cases enumerated in articles 738-739 Code of Practice) by opposition and injunction *without* bond. *Ib.*

The facts that a written demand was made on defendant before suit was brought, that he answered by a general denial, and specially averred in his answer that too much interest was demanded, and it appears that he and his counsel were absent on the trial of the cause, are all corroborating circumstances, and in conjunction with the testimony of one witness, will prove a claim for more than five hundred dollars. *M. Goepper & Sons vs. Casper Lusse, 392.*

On the rule to dissolve an attachment the defendant in the suit may put at issue, and require to be passed on, all of the allegations of the plaintiff's affidavit, on which the writ of attachment itself legally rests. And when such allegations are thus put at issue, the plaintiff must prove them to be true. On such a rule however, no allegation, or fact, involving the merits of the case, will be considered.

*Herrmann & Vignes vs. Justin L. Amédée, 393.*

Joint obligors may be sued separately, and judgment recovered against

**PRACTICE AND PLEADING--Continued.**

each of them for his proportion of the debt, without making his co-obligors parties to the suit.

*H. J. Mitchell, Tutrir, vs. T. H. D'Armond, 396.*

**Under** the plea of general denial, in a suit brought to enforce the funding of certain State bonds, evidence is not admissible to prove an adverse title to the one declared on by the holder of the bonds.

*Hamlin et al. vs. the Board of Liquidators, 443.*

**In** suits between holders of bonds and the Board of Liquidation, (under the funding acts of 1874 and 1875) the only question that can be put at issue is the validity of the bonds, as obligations of the State. The issue of the *ownership* of the bonds can not be raised, save by a rival claimant, intervening and setting up an adverse title. *Ib.*

**The** mere fact that a certain bond of the State belongs to one of the issues declared by the act of 1875 to be questioned and doubtful, will not authorize the holder of that bond to intervene in a suit brought against the Board of Liquidators by the holder of bonds belonging to *another* of the questioned and doubtful issues. *Ib.*

**When** a certain fact put at issue by the pleadings is peculiarly within the knowledge of the defendant, such for instance as the consideration of a transfer made by him, the burden of proof is on him to show that fact. *Wm. M. Lovell vs. James A. Payne et al, 511.*

**The** refusal of the lower court to continue a case, on the ground that a material witness was absent, who had been properly summoned, and for whom an attachment was then out, will not lead this court to set aside the judgment, when it appears that the attachment for the absent witness issued six months before the trial of the case.

*Carroll & Co. vs. Hamilton, 520,*

**Amendments** of pleading will not be allowed during the trial of a case, when they will delay the trial, and change the issues.

*Sevin & Gourdain vs. Caillouet, 528.*

**Whether** the judge below has, or has not improperly refused to sign a bill of exception, is a question which can only be inquired into, when brought before this court in a *mandamus* proceeding.

*State vs. Gunter, 536.*

**The** charge of the lower court and the facts urged as grounds for a new trial can be brought before this court in no other way than by bills of exception. *Ib.*

**A** citation served on the husband, addressed to the husband and wife, is a good service on the wife. *McElvin vs. Taylor, 552.*

**Whether** a certain instrument is, or is not a public record, is a question of law for the court to determine. *State vs. Anderson, 557.*

**The** administrator of a succession can not maintain an action for the recovery of real estate, alleged to be the property of the succession,

**PRACTICE AND PLEADING—Continued.**

when the heirs of the succession are present, and all of them are not made parties to the suit. *Ledoux vs. Burton*, 576.

It is only in cases in which the execution of a judgment is enjoined, that, on the trial of the injunction, the sureties on the injunction bond are parties to the suit. It is therefore only in such cases that the sureties can be condemned in damages, in the judgment dissolving the injunction. In all other cases the sureties must be proceeded against by a separate action on the bond.

*Scott & Williams vs. the Sheriff et al*, 580.

Where there is no community of interest between several co-plaintiffs in a suit, although the rights and relief sought are of the same character, the actions of these several parties can only be cumulated by consent of the defendant. Such a suit, on an exception of misjoinder of parties by the defendant, will be dismissed.

*C. D. Favrot et al vs. Parish of East Baton Rouge*, 606.

The application for a rehearing made by an *amicus curiæ*, although filed within six days, will not suspend a judgment of this court, when not called to the attention of the court, and no order is asked, or made in relation to it, within that time.

*Lesassier & Binder vs. the Board of Liquidation*, 611.

A plea of prescription filed by a defendant impliedly admits the plaintiff's ownership of the note sued on.

*B. W. Sewell vs. Chas. McVay, Executor*, 673.

The tender of a license tax, and its deposit in court by a defendant who is threatened by the State with seizure, and against whom an injunction has issued to restrain him from carrying on his business, are not such voluntary acts as will estop him from pleading the unconstitutionality of the tax, and recovering the amount of the tax, if the same is adjudged to be illegal.

*The State vs. John P. Becker*, 682.

Any change in the judgment of the lower court, desired by the appellee, must be asked for by him in a regular answer to the appeal. It is not sufficient to demand it merely in his brief. *Ib.*

A mortgage creditor may proceed directly against the property subject to his mortgage, even though the property may have been sold for taxes, and the tax title be in the name of a third person, when it appears from the evidence that such title is a fraudulent simulation, and that the original mortgage debtor, who had colluded with the purchaser at the tax sale, is still the real owner of the property.

*S. T. Austin, Jr., vs. Citizens' Bank and Sheriff*, 689.

A judgment absolutely null, may be attacked collaterally, in any form of proceeding, by any one having the least interest to have the nullity pronounced. *Conery vs. Rotchford, Brown & Co.*, 692.

PRACTICE AND PLEADING—*Continued.*

The executor may prosecute to its final termination, an action instituted by the testator to annul a donation *inter vivos* made by him.

*E. S. Eskridge and Husband vs. E. D. Farrar, Agent; and M. E. Ogden et al. vs. the Heirs et al. of John Perkins, 718.*

A reconventional demand for damages can not be separately tried, and the judgment rendered on such a demand can not be separately appealed from. It must be tried and appealed with the main suit.

*Crescent City L. S. L. & Slaughter-House Co. vs. Larrieux, 740.*

The court can not, of its own motion, change the form of a proceeding from an executory, to an ordinary one. Such a change can not be made without the assent of the seizing creditor.

*Calhoun vs. Mechanics' and Traders' Bank, 772.*

An action to annul a judgment can only be brought by one who has a real and actual interest impaired by such judgment.

*Neel vs. Hibard, 808.*

When the motion for a new trial, on the ground of newly discovered evidence, does not disclose the evidence, or the source from which it is derived, the motion is defective, and should be overruled.

*The State vs. S. W. Curtis, 814.*

Under our practice nothing prevents the cumulation of demands for the double purpose of proving the existence of a partnership, when the defendant has denied it, and for its liquidation, when proved.

*Millis vs. Fellows, 824.*

To entitle a party to the continuance of a case, on the ground of absent witnesses, it is necessary not merely to allege but to prove, that he had been diligent, that he was surprised, that he could not prove the facts by other available witnesses, and that they were not absent by his consent or procurement. *Ib.*

When the court orders the defendant to produce in court certain books, which plaintiff swears will prove certain facts, and defendant files, in response to the order, an evasive answer, and fails to produce the books, on the day fixed in the order [no matter whether the case came up for trial that day or not] the court will be authorized to order that the *specific* facts (but only the specific facts) sworn to by the plaintiff, be taken as confessed by the defendant. *Ib.*

Judgments which are not absolutely null and void, can not be attacked in any collateral manner.

*Compton vs. Sandford, 833.*

A general allegation, in an exception, that the charge of the lower judge "is not law," is too vague.

*State vs. Williams, 842.*

The citation of appeal, in a case where the State is a party, must be served on the attorney for the State who has obtained the judgment appealed from. If absent, the service must be made at his domicile as in ordinary cases. *The State vs. George Tennant et al, 852.*

**PRACTICE AND PLEADING—Continued.**

In a suit to annul a tax sale of real estate made by a State tax collector, the State is not a necessary party.

*Workingmen's Bank vs. Blaise Lannes et al.*, 871.

Any absolute nullities in a tax sale of property may be set up, and availed of by the creditors of the owner. *Ib.*

One of the defendants in a suit in which a formal judgment has been rendered can not disturb that judgment either by an action of nullity, or by appeal, without making all parties to the proceeding who were parties to the original suit.

*John A. Morris vs. Neuville Bienvenu et al.*, 878.

An action of nullity can not be maintained pending a suspensive appeal involving the same issues. *Ib.*

One who is a citizen of another State, although he have a dwelling here, and reside in it, for some months during each year, is nevertheless an "absentee" and hence, if he have no known representative here, may be legally represented in a suit brought against him by a curator *ad hoc*. *Ib.*

When an absentee is brought into court not by attachment, but by service of citation on a curator *ad hoc*, it is not necessary to post the citation on the door of the court-room. *Ib.*

In a rule to compel the purchaser of property at a succession sale to comply with his bid, he can not put at issue the rightfulness of the recusation of the judge of the court from which the order for the sale issued.

*Succession of François Lecroix*, 924.

When one is sued as heir, or widow in community, or in any other representative capacity, the plea of general denial admits that capacity.

*Edwards vs. Ricks*, 926.

A non-resident debtor sued in this State and personally cited, may have a personal judgment rendered against him for the whole debt due by him.

*Leopold de Poret vs. A. L. Gusman et al.*, 930.

The allegations in a petition that a certain transfer of property is a simulation, and that it is a donation in disguise, are inconsistent.

*J. N. Brown, Administrator, vs. E. A. R. Brown*, 966.

The objection that a part of the immovables of a succession sold for less than their appraised value, and hence that its sale was null, is not an objection which the notary, before whom a judicial partition of the succession property is pending, could be required to refer to the court, before completing the partition. Such an objection can only be properly urged by way of opposition to the homologation of the partition.

*Julia A. Ventress, Executrix, vs. Isaac D. Brown et al.*, 1012.

In the rule *nisi* granted by this court on an application for a writ of prohibition, the answer of the defendant should be sworn to.

*State ex rel. Kramer vs. Judge Sixth District Court*, 1014.

PRACTICE AND PLEADING—*Continued.*

The police jury of a parish are not a necessary party to a suit brought by the State tax collector to enforce the payment of parish taxes.

*Gonzales vs. Lindsay, 1085.*

An action to set aside a sale of real estate made by its deceased owner, on the ground of simulation, may be brought by the executor and forced heirs collectively, or by the heirs separately.

*A. A. Guilbeau, Tutor, et al. vs. Tréville Thibodeau et al., 1099.*

The amendment to an answer which substantially changes the defense will not be permitted. *Ib.*

A defendant who excepts to the capacity of the plaintiff to stand in judgment does not waive the benefit of the exception by failing to require the court to rule on it before passing to the merits.

*Elisée Thibodeaux vs. Adolphe Comeau and Wife, 1119.*

The dative testamentary executor alone can not maintain an action to revoke a donation *inter vivos* made by the deceased, on the ground that the donees have not fulfilled the conditions of the donation. The heirs of the deceased are necessary parties to such an action. *Ib.*

In a rule taken on a judge to show cause why he should not be recused in a certain suit, personal citation of the defendant, even when served on him in a parish other than the parish of his domicile, is sufficient.

*State ex rel. W. F. Schwing, District Attorney pro tem., vs. Theodore Fontelieu et al., 1122.*

Parties may be sued before whatever tribunal the Legislature shall designate. *Ib.*

To a rule taken under act 129 of 1877 on the district judge, and the parish judge of the parish in which a certain suit has been brought, to show cause why both of them should not be recused in the suit, the parish judge is a necessary party to the rule, and the trial of the rule should be continued until he has been cited. *Ib.*

A reconventional demand must set forth the claim of defendant with the same precision as would be required in a petition for the same cause of action, and a mere reference in his answer, to a former suit brought by the defendant, does not make the allegations of the petition in that suit a part of his answer.

*W. C. Teal et al. vs. Oscar S. Lyons et al., 1140.*

When the offsetting claim set up by the defendant is wholly independent of, and distinct from the claim of the plaintiffs, the mere fact that one of the plaintiffs is in another parish from the one in which the suit is brought, will not authorize the defendant to plead his claim in reconvention. *Ib.*

The filing of an amended opposition to a tableau of distribution will

**PRACTICE AND PLEADING—Continued.**

not be permitted, when it prays the court to do the very reverse of what the same opposer, in his original opposition, has judicially admitted ought to be done.

*Succession of Jacob Anselm. Opposition of a Creditor, 1145.*

On the trial of the exception of no cause of action, the Court can consider only the allegations of the petition, and the exhibits referred to, and made part thereof. *Edward Nalle vs. T. W. Baird, 1148.*

The defendant in injunction is authorized to compel the plaintiff to prove the truth of the facts alleged by him, in a summary manner. It is not needful for the suit to be at issue, or fixed for trial, or called, before the rule on the plaintiff to prove his alleged facts can be tried.

*W. C. Williamson vs. T. P. Richardson, Sheriff, et al., 1163.*

When a debtor enjoins the execution of a judgment for any of the causes mentioned in article 739 of the Code of Practice, he is not permitted, on the summary trial of the rule on him, to prove the facts alleged by him, to introduce evidence of any thing but the particular cause in article 739 on which he has based his injunction.

*Ib.*

A foreign corporation, represented by a general agent, and local Board of Directors residing in the city of New Orleans, can not be brought into court by a citation served on a local agent domiciled in one of the country towns of Louisiana, who is only authorized to receive applications for insurance, and give binding receipts for the same, and who has not exercised, or represented that he possessed, any other authority.

*W. P. Weight et al. vs. Liverpool, London & Globe Insurance Company, 1186.*

It is not an inconsistency in pleading, in a direct action to annul, to allege that a sale is simulated, and if not simulated that it is fraudulent.

*B. M. Johnson vs. Mrs. Julia Mayer et al., 1203.*

Where a defendant alleges as a ground of defense, error, overcharges, and payment, and sets up a claim in reconvention on the basis of those allegations, he must set them forth with such particularity as to put the plaintiff on his guard, before he will be allowed to introduce evidence in proof of them.

*Bayly & Pond vs. Stacy & Poland, 1210.*

Replications, under our law, are not admissible, and all the allegations of an answer are open to any objections of law or fact. *Ib.*

Pleas in reconvention require no service, and need not be put at issue by answer or default. *Ib.*

The alleged owner of property which has been sold at a tax-sale can not maintain an action for its recovery, until he has tendered to the

**PRACTICE AND PLEADING—Continued.**

purchaser at the tax-sale the price paid by the latter, and which was applied to the payment of the taxes and costs due by the owner.

*Lola Blanton vs. John T. Ludeling et al.*, 1232.

One who urges an exception of misnomer must allege, and prove the real christian name, and that done, the party against whom the exception is filed should be permitted to amend at once.

*R. W. Daugherty et al. vs. Executrix of S. W. Vance*, 1246.

Where a third person in whose possession property has been attached, intervenes, and claims the ownership of the property, his intervention need be served only on the plaintiff in attachment. It is not necessary for him to cite the defendant in attachment who does not dispute his title.

*Henry Gerson, Jr., vs. Larkin Jamar*, 1294,

Except in a case of trespass on real estate, a claim for damages can not be made in an intervention against one who does not reside in the parish where the principal action is pending. *Ib.*

A claim for damages against the sheriff can not be coupled with an intervention demand setting up the intervenor's title to personal property attached in his hands. *Ib.*

An hypothecary action against a third possessor of mortgaged property who was not a party to the previous suit and judgment of the plaintiff against the former owner of the property is a new suit, and not the mere continuation of the previous suit.

*Garrett vs. Bonner*, 1305.

A state of facts brought to the attention of the court which would justify and require a new trial after judgment will justify the re-opening and re-assignment of the case before judgment.

*James Buckley vs. Wm. H. Seymour*, 1341.

A demand for the revendication of a certain property, and an alternative demand for its value, in case the defendants have incumbered it with obligations beyond its value, may be cumulated in the same suit.

*Maduel, Ex., vs. Tuyes et al.*, 1404.

**PRESCRIPTION.**

The claims of sheriffs, and clerks of courts, for the annual sums of money due them for their services in the criminal matters arising in their courts, are not prescribed in two years from their maturity unless proved up, and audited within that time. This prescription only applies to claims which require evidence to establish, not to those whose amounts are fixed by law.

*The State ex rel. Monroe M. Samuel vs. Allen Jumel*, 339.

A verbal acknowledgment of, and promise to pay a promissory note, made by one of its solidary makers before its prescription, will interrupt prescription as to all of the makers.

*Boulli vs. Sarpy*, 494.



**PRESCRIPTION—Continued.**

Open accounts of merchants and factors for supplies furnished, and money advanced, are prescribed in three years.

*Sevin & Gourdain vs. Caillouet, 528.*

Not only good faith, and possession of real estate for ten years is required, but also a legal and transferable title of ownership is required in order to acquire said property by prescription.

*Pendegast vs. Schawtz, 590.*

The State not being suable, except by her consent, prescription, as to debts due by her, is suspended.

*Lesassier & Binder vs. the Board of Liquidation, 611.*

Prescription does not run against a debt due by the husband to the wife, during the marriage.

*Sewell vs. McVay, 673.*

Prescription does not begin to run against a debt due by the father and natural tutor to his children, until his death, or their majority. *Ib.*

Prescription does not run against a debt due by a father's succession to his minor children, during their minority. *Ib.*

The suit of a creditor to annul a conveyance of property by his debtor, for any ground of fraud (except the one of giving an unjust preference by an insolvent debtor) is only prescribed in one year from the time the creditor has obtained judgment against the debtor.

*Lehman, Abraham & Co. vs. Mrs. Yette Levy and Husband, 745.*

One who holds possession of real estate as an agent, can not acquire the property of such estate by prescription.

*Aurore Neel vs. Pélagie Hibard, 808.*

The acknowledgment of a succession debt by the administrator of the succession suspends the prescription of the debt as long as the property of the succession remains in the hands of the administrator, under administration.

*Henry Renshaw vs. Geo. W. Stafford, Executor, et al., 853.*

One who holds as owner peaceable, public, and uninterrupted possession for ten years of an immovable which he has acquired from one whom he honestly believed to be the real owner, under a title translatable of the property, acquires by prescription the legal ownership of the immovable.

*J. Mat. Wells, Jr., Executor, vs. F. M. and Ida Wells, 935.*

Whoever alleges bad faith in the possessor of property who claims a title to it by prescription, must prove the bad faith. *Ib.*

A judgment rendered by a court of competent jurisdiction, and where the proper parties have been duly cited, can not be attacked in any collateral way, even by third persons not parties to it.

*Succession of P. G. Quin, 947.*

**PRESCRIPTION—Continued.**

The written acknowledgment, or judicial admission of a judgment debt of a succession, made by the executor before the debt is prescribed, will interrupt prescription. *Succession of Patrick, 1071.*

The action against the vendee to annul a simulated sale is not prescriptible. *Guilbeau vs. Thibodeau, 1099.*

The institution of executory proceedings on a mortgage note will interrupt prescription of the note, unless the proceedings are dismissed on motion of the plaintiff. *Tertrou vs. Durand, 1108.*

The action to annul a *dation en paiement* which was simulated, and thus void *ab initio*, is not subject to the prescription applicable to the dispositions of property that are real, but fraudulent as to creditors. *Queyrouse & Bois vs. Thibodeaux, 1114.*

The obligations of a depositary are prescribed in ten years from the time he is in default for not restoring the deposit.

*Berard vs. Boagni, 1125.*

The possession by the creditor of property of his debtor, with the latter's consent, for the purpose of paying himself out of its hire, is an acknowledgment of the debt which interrupts prescription.

*Scovel vs. Gill, 1207.*

Debts due the city of New Orleans on account of unpaid taxes are prescribed in ten years from the time the taxes are exigible.

*Succession of Zacharie, 1260.*

Letters of a debtor to his creditor declaring his inability to pay, and asking for indulgence, are such an acknowledgment of liability as interrupts prescription.

Interruption of prescription by the acknowledgment of the principal debtor interrupts it as to his surety.

*Bloom & Co. vs. Kern, 1263.*

The debt due for services as an agent or mandatary is only prescribed in ten years.

When one obligates himself in writing to pay a certain sum on the happening of a certain event, the obligation is only prescribed in ten years. *Chas. D. Gilmore vs. B. F. Logan, et al., 1276.*

Neither a suspensive nor devolutive appeal will prevent prescription from running against the judgment appealed from.

*Marbury vs. Pace, 1330.*

**PRESCRIPTION IN CRIMINAL MATTERS.**

SEE CRIMINAL LAW.

**PRESUMPTIONS OF LAW.**

SEE EVIDENCE.

**PRINCIPAL AND AGENT.**

Where a party, acting through an agent, loans money on the security of the borrower's mortgage, and the agent, who keeps the note in his

PRINCIPAL AND AGENT—*Continued.*

possession, pays over from time to time to his principal the accruing interest and parts of the principal of the note received from the maker, finally pays over to the principal the balance due on the note, without stating that he is paying his own money, and without obtaining the consent of his principal to buy, or even intimating that he desired to buy the note, he will not acquire any title to the note; and the note itself, and the accompanying mortgage, will be deemed extinguished.

*Albert G. Brice vs. John A. Watkins et al., 21.*

A power of attorney authorizing an agent to sell real estate need not be by authentic act. It is only necessary that it be in writing, and properly attes

*Amelia Smith vs. T. J. Kinney, 332.*

One who constitutes another his agent with full power to manage his mercantile house, and to do all acts appertaining to his business, makes himself liable for the value of all goods purchased by the agent in the line of that business.

*Schmidt & Zeigler vs. Sandal et al., 353.*

Where an agent, clothed with power to accept bills, has accepted a bill in the name of his principal, the latter can not escape liability as acceptor, on the ground that he had no interest in the transaction in which the bill was given, and that he had received no consideration, unless he proves that his agent, to the knowledge of the holder of the bill, has abused his power.

*Broadway Savings Bank of St. Louis vs. Edward Vorster et al., 587.*

A power of attorney authorizing an agent to sue for a specific debt, and to do all in the premises that the principal could do, carries with it the power to make the suit effective by attachment.

*De Poret vs. Gusman, 930.*

No act done, or declaration made by an agent in his individual capacity, and unauthorized by his principal, can estop him from doing any thing he is authorized to do as agent.

*Ib.*

An attorney in fact can not bind his principal as surety, unless he is specifically authorized to do it.

*State ex rel. Merchant vs. Daspit, 1112.*

## PRIVILEGE.

Where cotton is nominally sold for cash, but the price is not paid on delivery of the cotton, and the vendor receives on the following day a part of the price, and accepts security for the balance, he thereby waives any privilege he may have as vendor, and is estopped from sequestering the cotton in the hands of a subsequent *bona fide* vendee, or pledgee of the cotton.

*M. Musson & Co. vs. A. Foster Elliott, 147.*

**PRIVILEGE—Continued.**

The contractor who furnishes the material and builds a jail for a parish, under a contract with the police jury of the parish, has the mechanics' lien and privilege on the jail, to secure the payment of what is due him under the contract. *McKnight vs. Parish of Grant*, 361.

The mechanic who builds a church for a certain congregation, is entitled to the mechanic's lien on the church, and the ground, belonging to the congregation, on which the church is situated, to secure the payment of what is due him for his work.

*Jones vs. Trustees of the Congregation of Mount Zion*, 711.

A contractor who furnishes materials for a building and fails to record his contract, acquires no lien on the building, and the lot on which it is erected, and hence, no creditor of his can acquire such a lien from him, either by subrogation, or in any other way.

*Louis Schwartz vs. George Cronan et al. George A. Fosdick & Co., Intervenor*s, 993.

One who sells to a contractor the raw materials which are actually used by the contractor, in a manufactured form, in constructing certain portions of a building, and who has served on the owner of the building an attested account of the amount due him by the contractor, is only entitled to recover from the owner such an amount of the sum due by the owner to the contractor, as has been adjusted, ascertained, and fixed, in some one of the modes pointed out by sections two and three of article 2772 of the Civil Code. Such a furnisher of raw materials can acquire no lien, or privilege, except as subrogee to such privilege as the contractor may have acquired and preserved. *Ib.*

The privilege acquired by one creditor on certain property gives him, or his transferee, no preference over another creditor who had previously acquired a mortgage on the property, unless the act, or other evidence of the privilege debt, was recorded on the day the debt was contracted.

*Edward J. Gay & Co. vs. Gilbert A. Daigre et al.*, 1007.

Recording an account current for advances made by a factor to a planter, running through several months, the day after the date of the closing of the account, is not recording the evidence of the debt on the day on which the contract for making the advances was entered into. *Ib.*

The pledge which the act No. 66, passed by the Legislature in 1874, gives to factors, and others, on certain property of planters, when they have made and recorded certain written contracts, will not operate to the prejudice of creditors holding pre-existing mortgages on the property, unless the contracts were recorded on the day they were entered into. *Ib.*

**PRIVILEGE—Continued.**

A building contractor who fails to record his contract acquires no privilege on the building so far as third persons are concerned.

*Van Loan vs. Heffner, 1213.*

Where a vendor of real estate sets forth in the act of sale that he has received a portion of the price in cash, and notes of the vendee payable at a future day and secured by mortgage on the real estate for the balance of the price, but actually received in place of the cash, and without being induced to do it by error or fraud, drafts of the vendee or some third person, such drafts will not entitle the vendor, or his transferee, to a mortgage, or vendor's privilege on the property sold.

*Durham vs. Heirs of Daugherty, 1255.*

Contracts made with factors to give them a privilege or pledge on crops, must stipulate the sum to be secured by such privilege or pledge, and no further sum than that thus stipulated and fixed can be covered by such contracts to the prejudice of other creditors.

*Gay & Co. vs. Pike, 1332.*

The lessor of land fronting on a river and leased for dockyard purposes is entitled to the lessor's privilege on the dock itself, when the dock is attached in front of the land by a permanent staging, and for a permanent purpose.

*Cochran vs. Ocean Dry-Dock Co., 1365.*

Money and goods advanced by a factor to a planter and used in paying the laborers who make the crop constitute privilege debts on the crop.

*E. B. Benton vs. T. C. Mahan et al., 1401.*

Disbursements made through the sheriffs by order of court, to gather, manufacture, and ship the crops on a plantation in the keeping of the sheriff, are debts incurred for the preservation of the crops, and therefore privileged.

*Ib.*

**PROMISSORY NOTES.**

SEE BILLS AND NOTES.

**PUBLIC ADMINISTRATOR.**

A public administrator, as such, is not entitled to administer as dative testamentary executor a succession of which the testamentary executor has died, and one or more of the heirs are present in the State.

*Succession of Bougère, 422.*

Where a public administrator, who is one of the heirs of a succession, is appointed dative testamentary executor of the same, it will be assumed, if the contrary is not shown, that he was appointed, not as public administrator, but as heir, under the general law, and his commission will be fixed at two and a half per cent.

*Ib.*

One who is appointed to the office of Public Administrator at any time during an unexpired term of that office, is entitled to hold it, in virtue of that appointment, only to the end of that unexpired term.

*State ex rel. Wilson vs. Parker, 1182.*

**RAPE.**

SEE CRIMINAL LAW.

**RECORDERS' COURTS.**

The exercise of judicial power by the Recorders of New Orleans, when not extended further than the cognizance of cases arising under the regulations for the police of the city, is constitutional. Such cases need not be tried by jury.

*State ex rel. Geale vs. Recorder of First Recorder's Court, 450.*

**RECONVENTION.**

SEE PRACTICE AND PLEADING.

**RECUSATION.**

SEE JUDGES.

**REHEARING.**

SEE PRACTICE AND PLEADING.

**REMANDING CASES.**

SEE JUDGMENTS.

**REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.**

Where a person has a domicile in a State, and the evidence shows that he resides there with the intention of remaining, he is, in contemplation of the laws providing for the removal of causes from State to Federal courts, a citizen of that State.

*Frank Watson vs. Mrs. E. F. Bondurant, 1.*

Citizenship in a State is not lost by a temporary absence; but a prolonged residence in another State, accompanied by other acts, or by declarations showing an intention to acquire a domicile in the latter State, will forfeit citizenship in the former State, and preclude its being set up in a suit. *Ib.*

To qualify in this State as natural tutrix, or as testamentary executrix, without giving bond, is strong proof of an intention to permanently reside here, and is utterly incompatible with the claim of citizenship in another State. *Ib.*

A merely auxiliary proceeding, by which a third person comes in by way of injunction to protect his property from being seized and sold under a judgment to which he was not a party, is not removable, under the act of Congress of March 3, 1875, from the State to the Federal court. *Ib.*

When a judgment debtor brings suit in a State court to annul a judgment of that court against him, and in favor of a non-resident creditor, the latter is not, under the act of Congress passed in 1789, entitled to an order to remove the case to a Circuit Court of the United States. *D. L. Ranlett vs. Collier White Lead Company, 56.*

An order of a district court of the State granting the removal of a case to the Circuit Court of the United States may be appealed from.

*Warrick Tunstall vs. the Parish of Madison, 471.*

**REMOVAL OF CASES TO FEDERAL COURTS—Continued.**

When an application for the removal of a suit from a State to a Federal court is made, the State court has jurisdiction to determine the question whether the applicant has brought himself within the provisions of any act of Congress authorizing the removal. But in considering this question, the court should only allow such allegations of fact to be put at issue, as are material to its determination.

*Ib.*

In an application for the removal of a suit from a State to a Federal court under the act of Congress of 1867, known as the "Local Prejudice Act," the applicant need not swear to his citizenship. The necessary allegation as to his citizenship, need only be set forth in his pleadings.

*Ib.*

The affidavit required by the "Local Prejudice Act," should be made by the applicant himself. The affidavit of his *attorney*, that he (the attorney) has reason to believe and does believe, etc., is not sufficient.

*Ib.*

For the purposes of Federal jurisdiction a corporation, whether political, municipal, or commercial, is regarded as a citizen of the State in which it was created, without regard to the citizenship of its members. Thus, a parish of this State is a citizen of Louisiana.

*Ib.*

The "good and sufficient surety" required of the party who applies for the removal of a case to the Federal court need only be *offered* in the State court by the applicant at the time of filing his petition for removal. The written obligation of such surety need only be *filed*, after the surety has been accepted by the court.

*Ib.*

The affidavit required of an applicant for the removal of a case under the "Local Prejudice Act," may be taken before any commissioner for this State residing in another State. Such a commissioner has authority to administer the oath.

*Ib.*

Any suit between a citizen of this and another State, whether *in rem* or *in personam*, is under the act of Congress of 1875 removable from the State to the Federal court, when the matter in dispute exceeds \$500, and when the application to remove is made at, or before the term of the State court at which the suit could be first tried, and before the trial thereof. *Franklin Garrett vs. Wm. Bonner, 1305.*

Appearing and filing a plea of prescription in the State court, does not, under the act of Congress of 1875 prevent the defendant from demanding a removal of the suit to the Federal court.

*Ib.*

When a defendant has filed the proper application and bond for the removal of the suit to the Federal court, in a case where he had the legal right to the removal, the jurisdiction of the Federal court will not be affected by the subsequent death of the defendant, and the execution of the appeal bond by his executor.

*Ib.*

## RES ADJUDICATA.

In a suit for damages on the ground of a wrongful sequestration of land, the judgment rendered in a former suit between the same parties, involving the ownership of the land, can not be pleaded as *res adjudicata*. The objects aimed at, and the causes of action in the two suits are entirely different.

*Joshua C. Thoms vs. B. W. Sewell et al.*, 359.

Where a question of estoppel, as between certain parties to a suit, has been expressly, or by necessary implication raised, and definitively passed on, it can not again be put at issue in any subsequent suit between them.

*Chatenond vs. Hebert*, 404.

A final judgment against an intervenor in a sequestration suit, who claims the ownership of the property sequestered, has the force of *res adjudicata* as to those questions only that were passed on by the judgment; and hence those questions can not be subsequently raised by the intervenor when pursued as a surety on the bond given to release the property from the sequestration. A judgment has not the force of *res adjudicata* as to those who were not parties to it.

*D. R. Carroll & Co. vs. Mrs. Lizzie Hamilton et al., Post & Co., Intervenor*s, 520.

When the issues in a second suit are the same as those in a previous suit between the same parties, the mere fact that additional parties appear in the second suit will not prevent the judgment in the former suit from having the effect of *res adjudicata*, as between the parties who appeared in both suits, in the same capacities.

*Ledoux vs. Burton*, 576.

A judgment can not have the force of *res adjudicata* as to one not a party to it.

*Mrs. S. C. F. Logan vs. Harriet Herbert*, 727.

So far as relates to creditors holding antecedent mortgages on property, and their recourse on the property is concerned, judgments obtained by others against their debtor, estopping him from setting up ownership to the property, are not *res adjudicata* as to them. *Ib.*

The issue of title to certain property, passed on by a final judgment, can not be raised again in a subsequent suit between the same parties.

*Compton vs. Sandford*, 833.

In order to maintain the plea of *res adjudicata* there must be an identity of parties, of capacity, of object, and of cause of action.

*State ex rel. Collens vs. Jumel, Auditor*, 861.

A judgment against a party in a suit brought by her, as owner, for the recovery of certain land, may be pleaded as *res adjudicata* in a subsequent petitory action for the same land, brought by her heirs.

*Sharkey vs. Bankston*, 891.



## REVENDEICATION.

SEE NULLITY OF SALES.

## REVIVAL OF JUDGMENTS.

A void judgment can not be revived. *Laurent vs. Beelman*, 363.

A judgment reviving a judgment does not render valid that which is invalid, and does not cure radical nullities in the judgment revived.

*Marie Perkins Evans and Husband vs. Payne & Harrison*, 498.

In a suit to revive a judgment the defendant may allege and prove any fact showing the absolute nullity of the judgment. A judgment absolutely null and void, can not be revived. It is essential to the revival of a judgment that there should be a valid and subsisting one, which is a fact for the plaintiff to establish.

*Conery vs. Rotchford, Brown & Co.*, 692.

In a suit to revive a judgment against a succession, the acceptance of service, and waiver of citation by the administrator will be deemed a good service, and will justify the judgment of revival.

*Logan vs. Herbert*, 727.

Service of citation, and a certified copy of the petition in a suit, before the proper court to revive a judgment, made on the administrator of the judgment debtor within ten years of the date of the judgment, will interrupt prescription, even though the number of days within which the defendant was called on to answer was not specially set forth in the citation.

*Marcellite Martinez et al. vs. Succession of Adolphe Vives*, 818.

The law of this State authorizing the revival of judgments was not intended to provide any different mode of *interrupting* prescription of judgments from those applicable to other forms of debt, but was only intended to prevent the prescription of judgment debts, and continue them in force for ten years from the date of the judgment of revival. The prescription of a debt evidenced by a judgment, can be interrupted in the same modes as the prescription of debts evidenced in any other way, except, that the acknowledgment of the judgment debt by the debtor must be *in writing*.

*Succession of J. C. Patrick. Opposition of Carroll, Executrix*, 1071.

In a suit to revive a judgment the sole issues to be tried are whether it had ever been rendered, and whether it had become extinct.

*Wm. Marbury et al. vs. Jas. F. Pace*, 1330.

A suit to revive a judgment is properly brought in the name of the original plaintiffs, even though the judgment may have become the property of third persons. *Ib.*

## RULES.

SEE PRACTICE AND PLEADING.

**SALE.**

A valid sale of property may be made with a right of redemption reserved by the vendor. *Bevens vs. Weill, 185.*

If the vendee in a contract of sale refuses to receive the article sold, the vendor may sell it at private sale; and on proving that he thus sold it at its full market price, he may recover from the vendee the difference between that price, and the price stipulated in the contract of sale. *Succession of Dougart, 264.*

One who buys property with full knowledge that the title to the same is in dispute, is not an innocent purchaser, and hence he acquires no greater rights than his vendors had.

*Joseph V. Ledoux, Administrator, vs. John C. Burton. Mrs. A. Ledoux, Intervenor, 576.*

An unrecorded deed transfers the property to the purchaser as against all the world, *except* creditors of the vendor, and *bona fide* purchasers from him without notice. *Logan vs. Herbert, 727.*

Except in a case when there is an express agreement in derogation of the general rule, the sale of goods, produce, or merchandise by weight, tale, or measure, is not perfect, and the goods at the risk of the buyer, until they have been weighed, counted, or measured.

*William S. Peterkin vs. George Martin, 894.*

The purchaser of goods who has paid their price knowing them to be damaged when he paid for them, is not thereby estopped from suing for a diminution of price, and damages, when it appears that there was an understanding between him and the seller, at the moment of payment, that his rights of reclamation were reserved.

*Ib.*

A vendor who is ignorant of the vices of the things sold, is liable only for the difference, at the time and place of sale, between the actual value of the thing sold, and what it would have been worth if sound; and the expenses connected with the sale. *Ib.*

Before a vendee can recover for diminution of the price, and for damages, on account of the damaged condition of the merchandise bought by him, he must show with reasonable certainty, that the merchandise was in an unsound condition at the time he became its owner. *William J. Peterkin vs. J. H. Oglesby & Co. et al., 907.*

When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, the transaction is not a simulated one. *Brown, Administrator, vs. Brown, 966.*

The delivery of immovables, where they are disposed of by public act, is always considered as accompanying the act, whether that act be a sale, or a *dation en paiement*. *Ib.*

The record of a written agreement to sell certain property does not amount to a sale of the property. *Foreman vs. Saxon, 1117.*

**SALE--Continued.**

An alleged sale of his property by a debtor can have no effect as against a creditor who has attached the property, when the purchaser of the property fails to show that the act of sale was filed or recorded before attachment was levied.

*J. C. Williams vs. Wm. Heffner, Sheriff, et al., 1193.*

Where a debtor has specially mortgaged his whole plantation, as a unit, he can not demand that it shall be sold in parts. The creditor may compel the sheriff to sell it as a whole, and in block.

*Morris vs. Womble, Sheriff, 1312.*

**SALES—PUBLIC.**

SEE SALE.

**SEIZURE AND SALE.**

A writ of seizure and sale can not legally issue, until three days after notice of the decree of court, granting the writ, has been served on the debtor.

*Joseph Billgery vs. Thomas Ferguson, 84.*

The notice of judgment in executory proceedings, which must be served on the debtor three days previous to the actual seizure of the mortgaged property by the sheriff, *must* be signed, and issued by the clerk of the court, and not by the sheriff. *Ib.*

If such notice has been issued by the sheriff, and objection to it is formally made before any sale of the seized property has taken place, the objection will be sustained, and no rights or liens will accrue to the seizing creditor, in virtue of the seizure. *Ib.*

Where the defendant in an executory proceeding enjoins the seizure and sale, on the ground that the mortgage debt is prescribed, he is dispensed from the necessity of giving a bond.

*State ex rel. W. C. Williamson vs. the Judge of the Fourteenth Judicial District, 314.*

The evidence is sufficient to authorize an order of seizure and sale, when the act of mortgage, note, and protest, are authentic in form.

*Renshaw vs. Richards, 398.*

When a creditor, who proceeds by executory process, states in the charging part of his petition that he has received a certain sum, in part payment of his debt, but in the prayer of his petition sets forth that he has received a less sum, the statement in the charging part of the petition will govern the prayer, and the order of seizure and sale, and entitle the debt to credit for the larger sum. *Ib.*

The executory proceeding may be arrested by injunction, and if, on being required, the defendant prove any of the facts set forth in article 742 of the Code of Practice, the order of seizure and sale will be revoked, and the plaintiff condemned to pay costs.

*Calhoun vs. Mechanics' and Traders' Bank, 772.*

**SEIZURE AND SALE—Continued.**

No copy of the petition for the order of seizure and sale need be served on the debtor, but only the notice of the order.

*Williamson vs. Richardson, 1163.*

The judge may grant an order of seizure and sale on a note which is prescribed on its face. *Ib.*

It is not necessary that any United States internal revenue stamps should be affixed to a note, or a mortgage, in order to make it competent evidence in our State courts.

*Pargoud vs. Richardson, 1286.*

In order to obtain executory process against property mortgaged to it by a deceased stockholder, it is necessary for the Citizens' Bank, like other mortgage creditors, to serve a notice of the order of seizure and sale on the legal representative of the deceased stockholder's succession, or on his heirs, if they are of age, and have accepted and are in possession of the succession.

*Gillaspie vs. Citizens' Bank of Louisiana, 1315.*

**SEPARATION OF PROPERTY.**

A judgment of separation of property between husband and wife which is absolutely void, may be assailed directly, or collaterally, by any one who has an interest to do so.

*Mrs. C. S. Willis vs. E. M. Ward, Tutor, 1282.*

A judgment of separation of property in favor of the wife, based exclusively on the incomplete testimony of her husband, is, as to third persons, an absolute nullity. *Ib.*

**SEQUESTRATION.**

Under the law of Louisiana mortgaged property may be sequestered.

*Gest & Atkinson vs. N. O., St. Louis, and Chicago R. R. Co., 28.*

A vendor of a movable who sues the executrix of the vendee, for the dissolution of the sale, and the recovery of the movable, and swears that he fears the defendant will part with, or dispose of the movable, during the pendency of the suit, is entitled to have the property sequestered. In such case he need not allege that he has a privilege on the property.

*Daugherty vs. Executrix of Vance, 1246.*

**SHERIFF.**

A sheriff, who without warrant of law, or order of court, ejects the rightful possessor from property, and substitutes a wrongful possessor, is liable jointly with the wrongful possessor for whatever damages the ejectment caused.

*Burton and Wife vs. Brugier and Sheriff, 478.*

The prescription, (of two years) of suits against a sheriff and his sureties for money collected by the sheriff and not accounted for, does not begin to run until the first demand for the money has been

**SHERIFF—Continued.**

made on him by the plaintiff, and the sheriff thus put in default for non-payment. *Soule vs. Norwood, 486.*

The sheriff of a parish can not be compelled to accept a certain sum, or sums of money in lieu of his fees of office, unless he has voluntarily contracted with the police jury to do so.

*State ex rel. Barrow, Sheriff, vs. Fisher, Treasurer, 514.*

**SHIPPING.**

The part owner of a vessel, not interested in her carrying passengers and property for hire, is not liable as a commercial partner for debts incurred for her running expenses.

*B. D. Woods & Bros. vs. Chas. J. Pickett et al., 1095.*

The part owner of a vessel can not be held even to a *pro rata* liability on a draft drawn by another part owner in the name of the vessel and her owners, for an insurance of the vessel taken out for the benefit and security of a third person; unless he has authorized, or has ratified the drawing of the draft, or profited by it. *Ib.*

**SIMULATION.**

SEE INSOLVENCY AND SALE.

**STAMPS, U. S.**

SEE EVIDENCE.

**SUBROGATION.**

Subrogation to a creditor's rights and liens only takes place in favor of a third person who pays the debt, (when such third person has no interest in paying it,) by an express agreement to that effect, entered into at the time of payment. *Brice vs. Watkins et al., 21.*

**SUCCESSION.**

It is not necessary that a succession which has been accepted with benefit of inventory should be entirely administered and liquidated, before the property of the succession can come into the legal possession of the beneficiary heirs. *Martin Soye vs. M. A. Price et al., 93.*

The legal heirs of a succession, on giving the security prescribed by law, (if so required,) are entitled to be put into possession of the property of the succession when the legatees consent, and the creditors of the succession do not oppose.

*Succession of Charles P. Boutte, 128.*

The executor of a succession which embraces a plantation among its assets is authorized to employ a competent person to take charge of the plantation, and keep its improvements in proper repair, when it appears from the evidence that it was impracticable to lease the place, and that the services of the keeper enured to the benefit of the property in his charge. A reasonable compensation to the keeper, in such a case, will be allowed as a privilege debt of the succession.

*Succession of Celestine Dorville, Widow of Felix Henry Loze, 133.*

**SUCCESSION—Continued.**

The omission on the part of an employee to present a statement of account to the employer for services rendered to the employer, will not prevent the former from recovering the value of those services from the employer's succession.

*Gaines vs. Succession of Del Campo, 245.*

The lapse of a legacy, caused by the legatee's death before that of the testator, will not give to the universal usufructuary created by the will, the usufruct of the property embraced in the lapsed legacy. Such property will fall to the legal heirs of the testator, if not otherwise specially disposed of in the will.

*Succession of Dougart, 268.*

If the purchaser of property at a succession sale wrongfully refuses to comply with the terms of the sale, the administrator of the succession may, after putting the purchaser in default by the tender of an act of sale, cause a second sale at the expense of the purchaser; and the purchaser will be liable for the costs of this second sale, and any loss to the succession caused by the property's selling for a smaller price at the second sale.

*Smith vs. Kinney, 332.*

An advertisement that "all the judgments" belonging to the succession of a certain decedent will be sold, is sufficiently specific to authorize the sale of every such judgment.

*Henry Pinard vs. M. M. George. C. C. Haley, Surety, 394.*

Neither the judgment debtor of a succession, nor the surety on the appeal bond of such debtor, is entitled to notice of the public sale of the judgment against such debtor, made in the course of administration.

*Ib.*

The existence of a succession free of debt can not be terminated, and its administration avoided, and the jurisdiction of the probate court thereby divested, by any agreement of the heirs to enter into possession of and divide the succession property, when one of the heirs is a minor, represented by a dative tutor, and one of the major heirs demands an administration.

*Mrs. Euphrosine Blake et al. vs. the Minors Frank Kearney and Ann Eliza Lake, 388.*

Where a surviving husband, who under a judgment in a partition suit, afterwards annulled, has bought certain community property in which he had a fourth, and his children also a fourth undivided interest, subsequently by notarial act pledges to a creditor his and their share of the notes executed by him as vendee in the partition sale, secured by mortgage and vendor's privilege on said property—the mere fact that his children of age join in the notarial act to give their consent to the pledge of the notes, in which they claimed an interest, will not bind them for the debt thus secured, nor will it

**SUCCESSION--Continued.**

amount to their renunciation of the previous mortgage they have on their father's interest in said property, on account of paraphernal claims of their mother.

*Mrs. Chatenond and Husband vs. Evariste Hebert et al., 404.*

Funds of the deceased deposited in a bank of a foreign State are a part of his succession, and should be taken into account by the executor in distributing the assets of the succession.

*Succession of Bougère, 422.*

The question of the widow's right to the marital fourth may be raised and passed on in her opposition to the executor's account, when there are no heirs here, or claiming an interest, and when the universal legatee is present and the account of the executor exhibits the proposed settlement of the succession.

*Succession of E. H. Leppelman. On Opposition of the Widow, 468.*

When it appears that neither creditors, nor other parties in interest have been cited to oppose a tableau of debts filed by an executor, and that there are no funds to distribute, and no funds had been collected or disbursed, the homologation of such a tableau is not binding on the creditors, or heirs, and they can not be called in by mere publication to establish or oppose it. *Succession of Walter O. Winn, 702.*

A succession can not be bound by a tableau filed by the attorney at law of the executrix, who is absent from the State, and when it appears that the attorney was not specially authorized to file the tableau, and that the executrix was ignorant of what was put down on it.

*Ib.*

It is only a creditor who has obtained a legal acknowledgment of, or a judgment recognizing his debt, that is entitled to provoke a sale of succession property to pay his debt. *Ib.*

A sale of property which had formerly belonged to a succession, (and which had been validly sold while the succession was in existence) made by the defunct administrator of the succession after it had been closed, and its assets partitioned, is absolutely void, and conveys no title whatever to the purchaser.

*Logan vs. Herbert, 727.*

Where there is an administration of a succession, the estate does not legally pass to a tutor, until the administrator renders his final account. *Rose L. Goux et al. vs. Joseph Moucla, 743.*

When the same person is at the same time administrator, and also tutor of a part of the heirs, his possession of the estate must be held to be as administrator. *Ib.*

No such officer as "provisional administrator," is now known to our law. If however such an officer should be appointed by the court,

SUCCESSION—*Continued.*

pending a contest, he has only the functions of a keeper, and may be set aside at the discretion of the court.

*Succession of Clark, 801.*

Where some of the heirs of a succession are beneficiary, and their debts, and the creditors of the succession, or the heirs of age demand an administration it should be ordered. *Ib.*

Where there are debts of a succession, and other circumstances authorizing the demand for its administration, a partition of its property among the heirs will not be ordered until it has been duly administered. *Ib.*

It is not necessary that the bastard child, born in this State of a slave mother, should have been legally "acknowledged" by the mother, in order to enable the emancipated mother to inherit from said child. *Neel vs. Hibard, 808.*

When a testamentary executrix has been destituted of her office, a dative testamentary executor may be legally appointed to administer the succession. *Sharkey vs. Bankston, 891.*

When the money paid for the property of a decedent sold by an order of court, has been used to pay his debts, his heir can not reclaim the property without first paying back, or tendering the sum thus used. *Ib.*

The fact that the succession property was sold by order of court, one half cash and the balance on a credit of twelve months, will not, of itself, vitiate the title passed by the sale.

*Succession of Lacroix, 924.*

The heirs of age of a deceased person are presumed to accept the succession, and his widow to accept the community, unless the heirs renounce the succession, and the widow the community, expressly, and by public act. *Edwards vs. Ricks, 926.*

The widow in community is liable for one half, and the heirs of the deceased, each for his virile portion of the other half of the debt due by the deceased on account of a trespass committed by him. *Ib.*

The universal legatee of a succession who has accepted the same, and who has also qualified as executrix, may, in her capacity as owner, make a valid sale of the property of the succession without any order of court authorizing her to act. *Wells vs. Wells, 935.*

It is not necessary that the person who has taken unauthorized possession of the effects of a vacant succession, or a part thereof, with intent to convert the same to his own use, should be criminally prosecuted, and convicted of the offense, before a creditor of the succession can institute suit to hold the offender liable for the debt due him by the succession.

*Peet, Yale & Bowling vs. Nalle & Cammack, 949.*



**SUCCESSION—Continued.**

Before an immovable, of which the widow in community and her minor children are the owners in indivision, can be legally sold, or mortgaged, it is necessary that a family meeting, legally constituted, shall set forth in its report that the sale, or mortgage, is of absolute necessity, or of evident advantage to the minors, and give its reasons for its determination.

*Jules Mayronne, Tutor, et al. vs. Eugene Waggaman, et al., 974.*

A family meeting, partly composed of one or more persons who have interests in conflict with those of the minors, is not legally constituted. *Ib.*

A stale demand for unliquidated damages on the succession of a deceased, on account of an alleged tort of the deceased, and never made during his life, will not be allowed, except on the strictest proof of its justice. *Succession of Woods, 1002.*

When by the will of a foreign testator property is devised to minors, in this State, under the tutorship of their surviving fathers or mothers, it will fall under the administration of the tutors, or tutrices. Any clause in the will requiring judicial appointment of special administrators to take charge of the property, during the minority of the legatees, will be considered as not having been written.

*Succession of Widow L. F. Foucher, Marquise de Circé, 1017.*

In order to make a valid appraisement of the undivided interest of an heir in a succession which has been seized under a *fi. fa.*, it is proper to appraise, not each separate effect of the succession, and then estimate the value of his share of such effect, but to appraise his interest as a single, undivided thing, and estimate its value, after deducting the debts and charges of the succession.

*Augustus F. Hickman vs. Gustave J. Freret et al., 1067.*

The special mortgage creditor of a succession is entitled to be paid out of the proceeds of the property on which his mortgage rests by preference over the expenses and charges of the administration, only when there are other funds of the succession out of which such expenses may be paid. *Succession of Patrick, 1071.*

The homologation by the clerk of the court of a tableau of the debts of a succession filed by the administrator, on which tableau a certain sum is set forth as due to a certain creditor, does not amount to a judgment for that sum in favor of the creditor, and hence does not authorize him to proceed by rule against the administrator to enforce the payment of the sum.

*Aug. Maraist, Syndic, vs. Honoré Guilbeau, Administrator, 1089.*

The forced heirs of a deceased person, whose *legitime* is impaired by an alleged simulated sale made by the deceased, are not estopped

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**SUCCESSION—Continued.**

from attacking the sale on the ground of simulation, but they can only annul the simulated sale to the extent that they are forced heirs.  
*Guilbeau vs. Thibodeau, 1099.*

The purchaser at public sale of succession property on which he has a first special mortgage, is entitled to retain possession of the purchase price, on executing his bond with solvent security in favor of the administrator, for a sum to be fixed by the court, conditioned that he shall pay such sums as may be ascertained, on a settlement of the succession, to be payable by preference to him out of the proceeds of the property so purchased by him, up to the amount of his bid.  
*A. Tertrou vs. C. C. Durand et al., 1108.*

When a succession owes no debts, and is composed exclusively of community property, and there is a surviving spouse, an administrator should not be appointed; and if appointed, a sale provoked by him of the property may be enjoined by the surviving spouse.

*Ursule Broussard vs. Leo Ditch and Sheriff, 1109.*

Before the creditors, or the administrator of a deceased vendor who has sold certain real estate by an act under private signature, can annul the act as simulated, it must appear that it injured the creditors, and that their debts existed before the execution of the act.

*Honoré Mèche et al. vs. D. Lalamie, Administrator, 1136.*

Heirs who occupy a portion of the succession property are liable to the succession for the rents of such property, during their occupancy.

*Succession of Bauman, 1138.*

Until the rendition of an account, and classification of the debts of the succession, the executor can not, even under an order of court, transfer to one creditor, in compensation or payment of his debt, an asset of the succession. Such a transfer is null and void.

*Helena Snyder et al. vs. Leonard Cutliff, 1195.*

Where the vendee of succession property sold on a twelve-months bond fails to pay the price, the executor may resolve the sale, and recover the property.  
*Ib.*

The child born after one hundred and eighty days after marriage is presumed to be the husband's child.

*Harrington vs. Barfield, 1297.*

A child begotten of a mother who had married in good faith, and before any doubt had arisen in her mind as to the existence of any legal impediment to her marriage, is entitled to all the rights of a legitimate heir of the mother.  
*Ib.*

Heirs are not chargeable with the rents and revenues of the property which they have possessed and used as sole heirs in good faith, before notice was brought to them of the existence of another heir, previously not heard of.  
*Ib.*

**SUCCESSION—Continued.**

**Minors, who are beneficiary heirs, are not entitled to sue for the recovery of any specific property belonging to the succession of which they are heirs, or the rents of the same, but only for the residuum of that succession, after its debts have been paid. But they are entitled to sue to reduce the amount of the debts of the succession, or to bring into the succession any property which belongs to it, and which may be in the possession of, and claimed by others.**

*Wm. M. Gillaspie vs. Citizens' Bank of Louisiana et al., 1315.*

**SURETIES.**

**Where two parties appeal from a judgment *in solido*, rendered against them individually, on account of a debt contracted by a commercial firm, then in liquidation, of which they had been the sole members, and their appeal bond is signed in the *firm* name, and also by one of the defendants in his own name, the surety on the appeal bond will be held liable for any judgment on appeal, rendered against the defendant who had signed the bond in his own name. The name of the firm to the bond will be treated as mere surplusage.**

*John Anderson vs. John J. Arnette et al., 72.*

**Under the law of this State the discharge in bankruptcy of the principal on an appeal bond, will not release the surety on that bond from any obligation he incurred by signing the bond.**

*Serra e Hijo vs. Hoffman & Co., 67.*

**The surety who pays the debt of his principal is subrogated, by mere operation of law, to all the rights of the creditors. No act of subrogation by the creditor, in his favor, is required. *Ib.***

**The surety on a forthcoming bond can only claim a release from his obligation, because the sheriff has made a return of the *fi. fa.* issued against the principal of the bond before the return day of the writ, by showing that he was injured thereby. And even then he can only claim a release to the extent of the injury proved.**

*Stewart vs. Lacoume, 157.*

**The surety on a bond for the release of property provisionally seized by a lessor, becomes liable from the moment he fails to return the released property to the sheriff, when the latter, under a *fi. fa.* against the principal on the bond, makes a demand on the surety. *Ib.***

**The surety on an appeal bond, when his principal has been cast on appeal, may be proceeded against by rule for the amount of the judgment when the uncontradicted return of the sheriff on the *fi. fa.* against the principal, shows that after diligent search the principal could not be found; that the surety failed to point out property of the principal after being called on by the sheriff to do so; and that the sheriff could find no property of the principal to levy on.**

*Pinard vs. George, 384.*

**SURETIES**—*Continued.*

The surety on an appeal bond can not escape his liability on the ground that the sheriff's return on the *fi. fa.* against the principal on the bond was prematurely made, unless he proves that in some form or other that premature return has inured to his injury. To the extent of such injury, and only to that extent he would be discharged.

*Ib.*

Sureties who have formally admitted that their principal is dead, and that his succession is insolvent, can not afterward set up a demand for a discussion.

*B. & A. Soulé vs. Norwood, Administrator, et al., 486.*

The sureties on a bond given to release property sequestered, have a right, when sued on the bond, to prove that the sequestration was invalid, and illegal; and a refusal to allow them to introduce proof of this illegality, will be such an error as to justify the setting aside of the judgment below. *Carroll & Co. vs. Hamilton, 520.*

Sureties on the release bond have the right to prove that the property sequestered does not belong to the defendant in the sequestration suit. *Ib.*

Sureties on the release bond have the right to show that the plaintiff in the sequestration suit had no lien on the property sequestered, in a case where they have alleged fraud and collusion to their prejudice between the plaintiff and defendant in the sequestration suit. *Ib.*

A surety on a release bond who alleges a privilege on the property sequestered superior to the lien of the plaintiff in the sequestration, has a right to prove the alleged privilege. *Ib.*

The sureties on a release bond can not be held for more than the value of the property released from sequestration. *Ib.*

Where a part of the sequestered property has been released by a decree of court, the value of the balance of the property must be proved by the plaintiff in sequestration, before the liability of the sureties on the release bond can be fixed. *Ib.*

It is not necessary that the sheriff should call on the principal on an appeal bond to point out property, in order to hold the surety on the bond, when it appears from the sheriff's return that the principal, after diligent search and inquiry, could not be found.

*Cooper and Wife vs. Rhodes, 533.*

When it appears that the principals on an appeal bond own no property, and that the creditor has taken every reasonable step to exact payment from them, the liability of the surety on the bond will become fixed. *Ib.*

The surety on an appeal bond is liable for the full amount of whatever judgment the Supreme Court may render, without regard to the amount of the judgment appealed from. *Ib.*

**SURETIES—Continued.**

The fact that in the bond given for the release of one charged with crime there is no mention of the offense with which he is accused, nor of any affidavit, information, or indictment pending against him, will not release the surety on the bond.

*State vs. Nicol, Bowman, et al., 628.*

The sureties on a bond which was given for, and procured the release of a prisoner charged with a criminal offense can not gainsay its regularity, or the regularity of the proceeding in which it was allowed.

*Ib.*

Where a defendant who is enjoined from collecting the fees of an office, bonds out of the injunction, the surety on the release bond will be bound for the whole amount of the judgment rendered in favor of the plaintiff on account of said fees, unless there be an agreement between the plaintiff and the surety lessening the surety's liability.

*Elias George vs. B. F. Taylor, 770.*

The obligation of sureties on a bail bond is not affected by the fact that the indictment was found for an offense of a higher grade than that expressed in the bond, and which higher crime includes the lower.

*State vs. Tennant, 852.*

It is sufficient, if by the terms of the bail bond, the offense is substantially although not technically described.

*Ib.*

Where a mortgage debtor who has taken a suspensive appeal from an order of seizure and sale is cast on appeal, the mortgage creditor, who has subsequently obtained a judgment against the debtor for the balance due after deducting the proceeds of the mortgaged property, has a right of action, for the amount of the judgment, against the surety on the appeal bond of the mortgage debtor, from the moment the return of *nulla bona* has been made on the execution issued under judgment.

*D. Landry vs. François Victor, 1041.*

No recovery can be had against the surety on a release bond, given for the release of sequestered property, on which the plaintiff claims a lien, where the judgment is a merely personal one against the principal on the bond, containing no recognition of the plaintiff's lien or privilege on the property released, nor decreeing a restoration of the property to the plaintiff.

*Nalle vs. Baird, 1148.*

The sureties on the appearance bond of one committed on a felonious charge are entitled to be released from their bond, after the discharge of the grand jury at the first term of court after the execution of the bond, without finding a true bill.

*The State vs. E. H. Doane et al., 1194.*

The promise of a surety assuring the payment of the price of a specific lot of goods to be sold to the principal debtor is not a continuing

**SURETIES—Continued.**

guarantee, and hence does not cover other goods subsequently sold to the principal. *Bloom & Co. vs. Kern, 1263.*

Where an appellee, on the ground of the insolvency of the sureties on the appeal bond, has procured a judgment of the district court setting aside the appeal, (which has been filed in this court and not afterwards dismissed,) he can not subsequently pursue the sureties in virtue of a judgment rendered in the case by this court.

*A. M. Agelasto vs. W. R. Mills. Rightor et al., Sureties, 1345.*

The surety on an appeal bond has the right to show in his defense that a legal sale of the principal's property would have satisfied the plaintiff's writ, or that the fraud of the plaintiff prevented its satisfaction. *Lafayette Fire Insurance Co. vs. Remmers, 1347.*

**SURRENDER OF PROPERTY BY INSOLVENT DEBTORS.**

SEE INSOLVENCY.

**TAX-ASSESSMENT AND TAX ASSESSORS.**

The power of the arbitrators, to whom the law refers the complaints of taxpayers touching the over assessment of property made by the tax assessors, is limited to ascertaining the value of the property listed on the assessment rolls. They have no power to determine what is, and what is not exempt from taxation, but any award they may make reducing the valuation of property listed, is binding. "Over assessment" means *over valuation*.

*State ex rel. N. O. City Railroad Company vs. the Board of Assessors, 261.*

A mandamus will issue to compel the Board of Assessors to enter on their assessment rolls, the value put by the arbitrators on any property listed on those rolls. *Ib.*

Oral evidence is not admissible to prove the written demand made by a property owner in New Orleans on the Administrator of Assessments, asking for a reduction of the assessment on his property. The written demand itself is the best evidence.

*City of New Orleans vs. Fourchy, 910.*

A tax assessor is not authorized to assess and advertise lands for sale, as the property of an "unknown" person, when it appears that he could, with ordinary diligence, have ascertained who the real owner was.

*William E. Rapp vs. S. M. Lowry. Sarah A. Dorsey et al., Warrantors, 1272.*

**TAXATION AND TAX JUDGMENTS.**

Property used for school purposes, and the lots appurtenant to and used therewith, are exempt from taxation.

*First Presbyterian Church vs. City of New Orleans, 259.*

**TAXATION AND TAX JUDGMENTS—Continued.**

Property belonging to a church, and used as a parsonage, or rectory, is not exempt from taxation. *Ib.*

Property can not be seized under a *fi. fa.* and sold to satisfy a judgment, for taxes, when the property indicated in the judgment, writ of execution, and advertisement, is merely described as a certain number of lots, in a certain square, between certain streets. Such a description is too vague to identify the property.

*Charles Marin et al. vs. Sheriff and City of New Orleans, 293.*

Writs of *feri facias*, issued under a judgment for taxes, are not returnable within the delay prescribed for ordinary writs of *fi. fa.* but remain in force until satisfied, or ordered to be returned by competent authority. *Ib.*

The purchaser of property against which no debt for taxes is registered, buys it free from all liens for taxes. Such property is not liable to be seized to satisfy a judgment against its former owner, for taxes which had accrued before he sold it. *Ib.*

The purchase by the State of property sold on account of unpaid taxes, extinguishes the debt and all liens arising from those taxes.

*Sarah F. Bradford vs. A. D. Lafargue, Collector, et al., 432.*

Lands belonging to the State are exempt from taxation, and hence one who purchases lands from the State takes them free from all liens and obligations springing from taxation. *Ib.*

The assessment against a tax-payer is not rendered null by merely omitting from the assessment roll, as exempt from taxation, five hundred dollars worth of personal property, and one thousand dollars of income. *City of New Orleans vs. Davidson and Hill, 554.*

The notes, bills, etc., representing the money loaned at interest by a corporation, constitutes a part of its property, and are liable to taxation.

*City of New Orleans vs. the Mechanics' and Traders' Insurance Company, 876.*

One who claims exemption from an income tax on the ground that his income consists of property not liable to taxation, must affirmatively show that his income does so consist.

*City of New Orleans vs. F. P. Fourchy, 910.*

The exemptions from taxation of \$500 worth of household furniture, and \$1000 of income, do not violate article No. 118 of the constitution of this State requiring taxation to be equal, and uniform. It does not appear that unlawful exemptions of property, or omissions to tax certain property, will affect the validity of an entire assessment. *Ib.*

Retail grocers who have paid their licenses are not entitled, as such, to sell liquor by the glass, but are entitled to sell it in quantities less than a gallon, to be consumed out of their stores.

*State vs. Sies, 918.*

# **TAXATION AND TAX JUDGMENTS—Continued.**

A planter or manufacturer who keeps such articles of merchandise only as are needed by laborers on his plantation, and sells them only to those laborers, and not to the general public, is not a retail dealer within the meaning of the revenue act, and hence is not subject to the license, or tax imposed on retail dealers.

*F. A. Luling vs. Labranche, Tax Collector, 972.*

A livery stable keeper who has paid as such, his State license tax, can not be compelled to pay an additional license to the State on the hacks and buggies employed him in his business.

*Archie P. Williams vs. A. Garignes, Tax Collector, 1994.*

A claim for taxes by the State will not be allowed when there is no proof of its registry or existence.

*A. F. Cochran vs. Ocean Dry-Dock Company. John L. Sterry et al., Third Opponents, 1365.*

## **TAX-SALES.**

A tax-sale of property, sold under an assessment made in the name of a deceased person to whom the property had not actually belonged, and without any notice served on any person in interest, is utterly without effect; and no judgment subsequently rendered on motion, can impart any validity to the title passed by such a sale.

*Fix vs. Succession of Mrs. Dierker, 175.*

So much of the price, paid by a purchaser of property at a void tax-sale, as was really due on the property for taxes, he is entitled to be refunded. *Ib.*

When a tax collector summarily seizes property and advertises it for sale for arrearages of taxes, and his right to do so is contested, he must specifically show what property he claims taxes on, what is the cash value of that property, and what the per centage on that value. Otherwise he will be enjoined from proceeding in the summary way allowed by the law.

*Clinton and Port Hudson Railroad Co. vs. Tax Collector, 626.*

Act No. 7, passed by the Legislature at its extra session, May 1875, postponed the payment of all taxes then due the State until the first of November, and any sale of lands made by a State tax collector between the passage of said act, and the first of November, 1875, on account of delinquent taxes, is null and void.

*Workingmen's Bank vs. Lannes et al., 871.*

Before a valid sale of real estate can be made by a State tax collector, on account of unpaid taxes, it is necessary that the owner of the real estate should have had ten days written or printed notice to pay the accrued taxes. *Ib.*

A tax sale of property assessed in the name, and for the taxes of one person, which belongs to another; or made under a seizure record-



**TAX-SALES—Continued.**

ed as against one not the owner ; or made under an advertisement describing it as the property of one not the owner is illegal and void. *Ib.*

In forced alienations without legal process, all the formalities prescribed must be observed, under pain of nullity. *Ib.*

The deed from a tax collector, of property sold at a tax sale, is received *prima facie*, as a valid title. Until the tax sale is set aside by a revocatory, or other proper action, contradictorily with the parties in interest, the title from the tax collector is presumed to be valid.

*W. P. O'Hern vs. Hibernia Insurance Co., 959.*

Tax titles which are not mere simulations can not be attacked collaterally. They are presumed to be valid until annulled in and by a revocatory action.

*Jurey & Gillis vs. Hugh Allison & Co. and Sheriff, 1234.*

While the tax deed to land sold as the property of an unknown person is *prima facie* evidence of a valid sale, yet, in the absence of recital in the deed, and proof *aliunde* of the appointment of a curator to represent the unknown owner, and of service of the twenty-days notice on the curator, the sale of the land by the assessor is absolutely void. A vendor of property can not subsequently acquire an outstanding title superior to the one he conveyed, and in virtue of this superior title oust his vendee of the property.

*Rapp vs. Lowry, 1272.*

A debtor whose property has been seized, sold, and bought in by his mortgage creditor, can not subsequently acquire a tax title to the property, to the prejudice of the creditor, in virtue of a sale made by the tax collector, for taxes assessed in his name, and which had accrued on the property while he was the owner.

*John Magner vs. the Hibernia Insurance Co., 1357.*

**TAX-TITLES.**

SEE TAX-SALES.

**TAX COLLECTORS.**

Up to the year 1877, the State tax collector was prohibited from paying over any school taxes collected by him, to any one but the treasurer of the School Board, and his payment of any portion of those taxes to the parish treasurer, prior to the year 1877, did not discharge him from liability for them. But when it appears that such payment of school taxes to the parish treasurer was made by a collector in good faith, and was approved by the police jury, and inured to the benefit of the parish, the parish should re-imburse to him the amount thus unduly received.

*Board of School Directors vs. O. Delahoussaye, Sr., 1097.*

**TAX COLLECTORS**—*Continued.*

Where a tax collector is superseded, and his successor collects part of the taxes embraced in the tax rolls, and blank licenses put into his hands, the outgoing collector and his sureties will be liable only for the amount collected by him, and not accounted for ; which amount must be proved by the State.

*State ex rel. Merchant vs. Taylor Daspit et al., 1112.*

**THIRD OPPOSITION.**

SEE PRACTICE AND PLEADING.

**THIRD PERSONS—IN CONTRACTS.**

SEE CONTRACTS.

**TUTORS.**

Unless opposed by creditors, or heirs of age, the natural tutor of minors may take in charge and administer, as tutor, the property of the minors; and his possession of the property, in contemplation of law, is their possession.

*Soye vs. Price et al., 93.*

The legal representative of the minors' heirs of a decedent may enjoin the administrator of the succession from selling any property of the succession, to satisfy a judgment against the decedent which is null and void.

*Bienvenu vs. E. T. Parker, 160.*

The general mortgage on the property of a tutrix, in favor of her minor child, may, on the advice of a legally constituted family meeting duly homologated, be legally postponed in favor of a special mortgage on the property, executed by the tutrix in order to obtain means to make repairs; and pay taxes on the property, and provide for the proper maintenance, and education of the minor. And where the minor has enjoyed the benefit of the money borrowed by the tutrix on such special mortgage, the minor will be thereafter estopped from interfering with any rights of property acquired under said special mortgage, or derived from its foreclosure.

*Pauline Beauregard vs. Theodore Leveau, 302.*

The tutor who received the proceeds of the sale of slaves, the property of the minors under his tutorship, some time before the late civil war, is liable to the minors for the amount of those proceeds.

*B. F. George vs. N. Amacker, 390.*

Where an heir who opposes the account filed by his former tutor, admits that he had received a certain sum of money from his tutor, but alleges that it was derived from a source different from the one set forth by the tutor, he must prove his allegation, or otherwise his admission will dispense the tutor from any other proof.

*Isaac D. Brown vs. Joseph Bessou, Administrator, 737.*

The legal mortgage of minors on the property of their tutors, is good, as against the tutor, their heirs, or partners in community, without being registered.

*Ib.*

**TUTORS—Continued.**

A tutor can not be held for more than he collected of a certain debt due the minor, when it is not shown that the debt was worth more than he collected. *Ib.*

Where a natural tutor, without authority from the court, borrows money for his own account and in his individual name, and expends the money on improvements of a plantation owned in common by him and his minor children, but which improvements were for the use and benefit of a planting partnership in which the minors had no interest, the minors can not be made liable for the borrowed money to the lender of the same.

*Mary A. Querin, Administratrix, vs. E. Carlin, 1131.*

And a subsequent mortgage of the minors' property to secure such a debt will not be binding, although authorized by the proceedings of a family meeting homologated by an order of court. *Ib.*

Where a settlement is made after the termination of a tutorship, by which the former ward accepts the former tutor's individual obligation, payable at a distant day, in lieu of the security of his bond, and the legal mortgage resulting from its record, the former ward loses all recourse on the property of the tutor which has passed into the *bona fide* ownership of a third person.

*Kelly vs. Sandidge, 1180.*

**USUFRUCT.**

Where a legacy in full property left by a husband to his widow is reduced, under article 1752 of the Civil Code to one of usufruct merely, the usufruct shall embrace one fifth of the husband's whole estate.

*Succession of Bollinger, 193.*

When the property of a legacy left by a deceased husband devolves on his legal heirs, on account of a lapse of the legacy, his widow will be entitled to the usufruct of the property, and hence not liable for its revenues.

*Succession of Dougart, 268.*

The usufructuary may at any moment renounce his usufruct. *Ib.*

Prescription does not begin to run against the claims of the usufructuary, on account of debts paid by him for which the property subject to the usufruct was liable, until the expiration of the usufruct.

*Ib.*

**VENDORS AND VENDEES.**

SEE SALE.

**WIDOWS.**

Before a widow can rightfully claim the marital fourth from the succession of her husband she must show that her husband was rich, and left her in necessitous circumstances. If she fails to prove either of those essential facts her claim to the marital fourth will be rejected.

*Succession of Leppelman, 468.*

**WIDOWS**—*Continued.*

Where the succession of a deceased husband, which is wholly composed of his half of the community property, the other half of which belongs to his surviving widow, is entirely free from debts, or only owes such trifling debts as she offers to pay, the appointment of an administrator of his succession is unnecessary, and illegal. The surviving widow has the right to take possession of the whole property and exclusively administer it, as the owner of one half of it, and as the usufructuary of the other half.

*Lewis Burton and Wife vs. O. Brugier and Sheriff, 478.*

The Probate Court has no authority to order a sale of the surviving wife's half of community property at the instance of an administrator of the husband's succession, illegally appointed by that court, in order to pay debts of the succession wrongfully created by the administrator.

*Ib.*

An order of court to sell the property of the husband's succession to pay its court costs and law charges, does not authorize the sheriff to sell the widow's half of the property.

*Ib.*

The agent of a widow, acting solely in virtue of a mandate executed by her while she was a married woman, can not bind her to any greater extent, as a widow, than he could have bound her as a married woman.

*Calhoun vs. Mechanics' and Traders' Bank, 772.*

The clause of a husband's will, by which his wife is constituted his universal legatee, on condition that if his sister survived his wife she should be entitled to have a certain sum from the wife's succession, does not involve a *fidei commissum*, or prohibited substitution. And hence on the death of the wife, who had accepted the husband's bequest, with the charge on it, the surviving sister of the husband has a right to claim the sum from the wife's succession.

*Succession of Mrs. P. J. Michon. Opposition of Mrs. Louis Ducourneau, 213.*

Testaments made in other States can not be carried into effect on property in this State, until registered in the court within whose jurisdiction the property is situated, and their execution ordered by the judge.

*Succession of Frances Parke Butler, 887.*

A foreign will, when duly authenticated, and admitted to probate at the testator's domicile, is entitled to be admitted to registry and execution in this State.

*Ib.*

A devise, by which property left to a minor is put in the possession and under the control of a third person until the majority of the minor, involves a *fidei commissum*, which is prohibited by our law.

*Succession of Foucher, 1017.*



